SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 174.

THE UNITED STATES, APPELLANTS, vs. LEWIS A. EATON.

INDEX.

1 In the Court of Claims.

LEWIS A. EATON
vs.
THE UNITED STATES. } 18691.

I.—*Petition, filed December 5, 1894.*

To the honorable the Chief Justice and Judges of the Court of Claims:

I. Your petitioner, Lewis A. Eaton, respectfully represents that he is a citizen of the United States, residing at Mebane, in the State of North Carolina, and has always borne true allegiance to the United States.

II. That heretofore, to wit, on the 13th day of June, 1892, he was residing at Bangkok, in the Kingdom of Siam, and was on said day duly nominated and appointed as vice-consul-general of the United States at said place to represent the Government of the United States in all things pertaining to the office of minister resident and consul-general of the United States at Bangkok, in the Kingdom of Siam, the minister resident and consul-general, Sempronius H. Boyd, being at that time unable to attend to his official duties by reason of severe illness, and thereupon claimant accepted the said appointment, took the oath of office, and entered upon the duties thereof, and was duly recognized as vice-consul-general by the Government of the United States and by the Government of Siam.

2 III. That on the 11th day of July, 1892, the said Sempronius H. Boyd, then minister resident and consul-general of the United States at Bangkok, Siam, took his departure from his post of duty for the United States, and left claimant in sole charge of the legation and consulate of the United States at said post, having duly notified the Department of State of the facts, and thereupon claimant assumed charge of said legation and consulate, the duties of which he had been actually discharging since the 13th day of June, 1892, during the illness of said Sempronius H. Boyd, and from and after the departure of said Boyd claimant continued in sole charge of said legation and consulate, and discharged the duties thereof, both of a diplomatic and consular character, with the acquiescence and approval and under the direction of the Department of State, up to and including the 17th day of May, 1893, when he was relieved of his duties.

IV. That upon receipt by the Department of State of the aforesaid notification from said Sempronius H. Boyd, as to his departure from his post, said Department, on September 2, 1892, transmitted to claimant a form bond prepared for his signature and execution as acting consul-general of the United States at Bangkok, Siam, which was duly executed by claimant and his sureties and forwarded to the Department of State, and on the 3rd day of January, 1893, said Department notified claimant that said bond had been approved and deposited with the Secretary of the Treasury. (See Exhibit A, herewith.)

Thereafter, on the 24th of January, 1893, the Department of State returned said bond to claimant for cancellation, and enclosed another form of bond prepared for his signature and execution as vice-consul-general of the United States at Bangkok, Siam, which was duly executed

by claimant and his sureties and transmitted to the Department of State; and thereafter, on the 28th of April, 1893, said Department
3 notified claimant that said bond as vice-consul-general had been approved and deposited with the Secretary of the Treasury, and that it replaced the bond given by him as acting consul-general, which had been rejected by the First Comptroller of the Treasury. (See Exhibit B, herewith.)

V. That claimant did not make or enter into any agreement with the said Sempronius H. Boyd as to the rate of compensation or proportion of the salary that claimant should receive during said Boyd's absence from his post after July 11, 1892, as aforesaid, and, further, claimant did not make or execute any waiver of his claim to salary during said Boyd's absence, and did not claim or receive any salary or pay as interpreter or prison-keeper or in any capacity other than that of vice-consul-general in charge of the legation and consulate-general at Bangkok during the time he was so in charge; that claimant was and is lawfully entitled for his services in discharging the duties of the office of minister resident and consul-general of the United States at Bangkok from and after the departure of said Boyd from his post of duty on July 11, 1892, as aforesaid, up to the expiration of his leave of absence of sixty days after his arrival in the United States, to wit, from July 12, 1892, to October 26, 1892, at the rate of one-half of the salary of five thousand dollars per annum, provided by law for said post, amounting to $726.90, and from October 27, 1892, to and including May 17, 1893, at the full rate of five thousand dollars per annum, amounting to $2,792.35.

VI. That claimant rendered his accounts for salary for the entire period from June 13, 1892, to May 17, 1893, in which he claimed and charged one-half the salary provided by law for the office of minister resident and consul-general at Bangkok, Siam, from June 13, 1892, to July 11, 1892, while he was discharging the duties of the office during the illness
4 of the minister resident and consul-general, and one-half the salary from and after the date of the departure of the minister resident and consul-general from his post up to the expiration of his leave of absence for sixty days after his arrival in the United States, to wit, from July 12, 1892, to October 26, 1892, and the full salary from October 27, 1892, up to and including May 17, 1893; and claimant credited in said accounts the total amount of fees, both official and notarial or unofficial, received by him during the whole of said period, amounting to $245.41, of which the sum of $68.00 was for official fees, and the sum of $177.41 for notarial or unofficial fees, as per Exhibit C, hereto attached.

VII. That said accounts so rendered were duly audited and adjusted by the accounting officers of the Treasury, by report No. 162708, as follows:

Item 1. One-half salary claimed from June 13, 1892, to July 11, 1892, during the illness of the minister resident and consul-general and prior to his departure from his post, amounting to $198.36, was disallowed.

Item 2. One-half salary claimed from July 12, 1892, after the departure of the minister resident and consul-general from his post, to October 26, 1892, the date of the expiration of his leave of absence of sixty days after his arrival in the United States, amounting to $726.90, as aforesaid, was suspended for further information.

Item 3. The full salary claimed from October 27, 1892, to May 17, 1873, amounting to $2,792.35, as aforesaid, was allowed and credited to claimant, and the total amount of fees, both official and notarial or unofficial, received by claimant, amounting to $245.41 as aforesaid, was charged to him, leaving a balance of $2,546.94, due claimant from the United States, which balance was duly certified by the First Comptroller of the Treasury and credited to claimant upon the books of the Treasury, and claimant was duly notified thereof by the First Comptroller of the Treasury on December 4, 1893.

VIII. The claimant thereafter, to wit, on the 26th day of April, 1894, transmitted to the First Comptroller of the Treasury the information and explanations required as to the foregoing suspended item No. 2, amounting to $726.90, and asked that the same be allowed and paid to him, which was refused, and said amount remains disallowed and unpaid; and claimant, without admitting or conceding the correctness of the settlement of his accounts as made by the accounting officers of the Treasury as aforesaid, or of any of the disallowances and suspensions made therein, made demand for the payment of the aforesaid balance of $2,546.94, set forth in the foregoing item No. 3, which had been allowed and certified and entered to the claimant's credit upon the books of the Treasury, but payment thereof was refused, and said balance is still withheld and unpaid.

IX. That claimant also rendered his accounts of disbursements for contingent expenses of the legation and consulate-general of the United States at Bangkok from July 1, 1892, to April 30, 1893, supported by the proper vouchers, and said accounts were duly adjusted by the accounting officers of the Treasury, by report No. 162,709, in which the sum of $5.73, expended and paid by claimant for lanterns and candles for the use of said legation during the quarter ending September 30, 1892, was suspended for explanation, which was thereafter duly furnished to the First Comptroller of the Treasury, to wit, on the 26th day of April, 1894, but the said sum of $5.73 has not been paid to claimant, and remains disallowed and unpaid.

X. That there is justly due and owing to the claimant the following-named amounts:

A. For notarial or unofficial fees charged to him in the settlement of his salary account by report No. 162708, as aforesaid, as per Exhibit C herewith	$177.41
B. For the item of salary suspended in the settlement of his accounts for salary by report No. 162708, as aforesaid	726.90
C. For the balance of salary found due to claimant by report No. 162708, as aforesaid, and certified to his credit	2,546.94
D. For item expended for contingent expenses by claimant, and suspended in the settlement of his account therefore by report No. 162709, as aforesaid	5.73
Making in all the sum of	3,456.98

Which has not been paid, or any part thereof.

XI. That no other action than as aforesaid has been had on this claim in Congress or by any other Department of the Government.

The petitioner is the sole owner of this claim and the only person interested therein. No assignment or transfer of this claim or any part thereof or interest therein has been made, and your petitioner believes the facts as stated in this petition to be true.

The petitioner is justly entitled to the amount herein claimed from the United States, after allowing all just credits and set-offs.

Wherefore your petitioner prays judgment against the United
7 States for three thousand four hundred and fifty-six dollars and ninety-eight cents ($3,456.98).

LEWIS A. EATON.
By J. R. GARRISON,
Attorney for Claimant.

CHANEY & RANNELS, *Counsel.*

STATE OF NORTH CAROLINA,
County of Alamance, ss.:

Lewis A. Eaton, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same, and the matters therein stated are true to the best of his knowledge and belief.

LEWIS A. EATON.

Subscribed and sworn to before me this first day of December, A. D. 1894.

[SEAL.] W. E. WHITE,
Notary Public.

EXHIBIT A.

Know all men by these presents that we, Lewis A. Eaton, principal, and Glenn Culbertson and John B. Dunlap, sureties, are held and firmly bound to the United States of America in the sum of three thousand dollars, money of the said United States, to the payment whereof we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators.

Witness our hands and seals this thirteenth day of June, 1892.

The condition of the above obligation is such that if the above bounden Lewis A. Eaton, appointed acting consul-general of the United
8 States at Bangkok, Siam, shall truly and faithfully discharge the duties of his said office according to law, and shall also truly and faithfully account for, pay over, and deliver up all moneys, goods, effects, books, records, papers, and other property which shall come into the hands of the said Lewis A. Eaton, or to the hands of any person for his use as such acting consul-general, under any law now or hereafter enacted, and faithfully perform all other duties now or hereafter lawfully imposed upon him as such acting consul-general, then this obligation to be void; otherwise, to remain in full force.

LEWIS A. EATON. [SEAL.]
GLENN CULBERTSON. [SEAL.]
JOHN B. DUNLAP. [SEAL.]

Signed, sealed, and delivered in the presence of:
A. WILLARD COOPER.
JOHN A. EAKIN.

I, L. A. Eaton, acting consul-general of the United States of America, hereby certify that Glenn Culbertson and John B. Dunlap, the sureties

named in the within bond, are severally sufficient to pay the penalty thereof, and that they are residents of Bangkok, Siam.

L. A. EATON,
Acting Consul-General.

Dated at Bangkok, November 17, 1892.

[Seal of U. S. Consulate-General.]

DEPARTMENT OF STATE,
Washington, January 3, 1893.

Approved.

_____,
Secretary of State.

[Signature of Secretary of State was erased from original bond when returned for cancellation.]

Mr. Eaton is a citizen of the United States.

F. O. ST. CLAIR,
Chief of the Consular Bureau.

9 [Cancelled; see letter from 1st Comptroller, January 7, 1893.]
[Original bond filed in this case.]

EXHIBIT B.

Know all men by these presents: That we, Lewis A. Eaton, principal, and Glenn Culbertson and John Barr Dunlap, sureties, are held and firmly bound to the United States of America in the sum of two thousand dollars, money of the said United States, to the payment whereof we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators.

Witness our hands and seals this thirteenth day of June, 1892.

The condition of the above obligation is such that if the above-bounden Lewis A. Eaton, appointed vice-consul-general of the United States at Bangkok, Siam, shall truly and faithfully discharge the duties of his said office according to law, and shall also truly and faithfully account for, pay over, and deliver up all moneys, goods, effects, books, records, papers, and other property which shall come into the hands of the said Lewis A. Eaton, or to the hands of any person for his use as such vice-consul-general under any law now or hereafter enacted, and faithfully perform all other duties now or hereafter lawfully imposed upon him as such vice-consul-general, then this obligation to be void; otherwise, to remain in full force.

LEWIS A. EATON. [SEAL.]
GLENN CULBERTSON. [SEAL.]
JOHN B. DUNLAP. [SEAL.]

Signed, sealed, and delivered in the presence of—

EUGENE PRESSLY DUNALP.
FRANK LOVELESS SNYDER.

10 I, Lewis A. Eaton, acting consul-general, hereby certify that Glenn Culbertson and John Barr Dunlap, the sureties named in

the within bond, are severally sufficient to pay the penalty thereof, and that they are residents of Bangkok, Siam.

LEWIS A. EATON,
Acting Consul-General.

Dated at Bangkok, Mar. 14th, 1893.

[Seal of U. S. consulate-general.]

DEPARTMENT OF STATE,
Washington, April 28, 1893.

Approved.

ALVEY A. ADEE,
Acting Secretary of State.

Mr. Eaton is a citizen of the United States.

W. E. FAISON,
Chief of the Consular Bureau.

[Certified copy filed in this case.]

EXHIBIT C.

Abstract of notarial or unofficial fees included in the record of fees covering the period from June 13, 1892, to May 17, 1893, transmitted to the accounting officers of the Treasury by Lewis A. Eaton, U. S. vice-consul-general at Bangkok, Siam, being part of the amount of $245.41, credited as fees in his account of salary for said period, and charged to him in the settlement thereof by report No. 162708.

11	I. For settlement of estates of decedents. Unofficial under decision of Supreme Court, U. S., in United States vs. Mosby, 133 U. S., 273, and in Stahel vs. United States, 26 Court of Claims, 193:		
	Estate of John Robertson	$9.72	
	" " J. M. Small	58.19	
			$67.91
	II. Fees for unofficial and notarial services, not embraced in the tariff of official fees, nor required by law or regulations:		
	(a) Marriage certificates. All in excess of the fee of $1.00 fixed by the tariff of fees, 3 at $1.50 each	4.50	
	(b) Seals to sundry documents, 14 at $2.00 each	28.00	
	(c) Servant certificate	6.00	
	(d) Letter and seal	2.00	
	(e) Certifying 2 documents	4.00	
	(f) Preparing complaint	2.00	
	(g) Judge's fees	35.00	
	(h) Fine	25.00	
	(i) Seals on summons, 3 at $1.00 each	3.00	
			$109.50
	Total		$177.41

The following are the items which make up the foregoing amount of $177.41, with the names and dates:

1892.		
July 2.	Mr. Cooper. Marriage certificate. Excess of amount collected over $1.00	$1.50
" 7.	Mr. Phraner. Marriage certificate. Excess of amount collected over $1.00	1.50
" 9.	Mr. Phraner. Seal	2.00
Aug. 11.	Chin Huet. Servant certificate	6.00
Sep. 20.	William Aijees. Seal	2.00
" 27.	" " 2 seals	4.00
Oct. 29.	John Robertson's estate, settlement of	9.72
12 Nov. 21.	C. E. Eckels. Marriage certificate. Excess of amount collected over $1.00	1.50

1893.			
March 24.	Dr. M. A. Cheek.	Letter and seal	$2.00
" 24.	" " "	Certifying 2 documents	4.00
" 24.	" " "	Complaint	2.00
" 24.	" " "	2 seals	4.00
" 24.	Hans Adamson.	1 seal	2.00
	Judge's fee		5.00
	Seal on summons		1.00
	Fine		25.00
	Judge's fee		15.00
	Seal on summons		1.00
	Judge's fee		15.00
	Seal on summons		1.00
April 10.	Lucy Dunlop.	One seal	2.00
" 10.	E. P. Dunlop.	Five seals	10.00
May 17.	J. P. Castenkiold.	One seal	2.00
" 17.	J. M. Small's estate, settlement of		58.19
	Total		177.41

II.—*Petition of Sempronius Boyd vs. The United States, No. 18527, filed June 16, 1894, and the case consolidated with the case of Lewis A. Eaton vs. The United States, No. 18691, January 4, 1895, by order of court, on motion of the defendants, claimants consenting thereto.*

The claimant, Sempronius H. Boyd, by Thomas C. Fletcher, his attorney, states that heretofore, to wit, on the first day of October, A. D. eighteen hundred and ninety, he, the said Boyd, was duly appointed, commissioned, and qualified as minister resident and consul-general of the United States at and for the Kingdom of Siam at Bangkok; that he duly qualified and entered upon the duties of such minister and consul-general at a salary fixed by law at five thousand dollars per year; that he faithfully performed the said duties thenceforth until the 11th day of February, A. D. eighteen hundred and ninety-three; that his salary as such minister and consul-general was promptly and duly paid to and received by him up to the first day of July, A. D. 1892, since which date the said salary nor any part thereof has not been paid; that
13 there is due and owing to him from the United States, as such minister and consul-general, for salary at the said rate of five thousand dollars per annum, the sum of three thousand and fifty-five dollars and fifty-five cents, being for salary aforesaid from the 1st day of July, 1892, to the 11th day of February, 1893. Wherefore claimant asks judgment against the said United States for the said sum of three thousand and fifty-five dollars and fifty-five cents.

SEMPRONIUS H. BOYD,
Claimant.

By THO C. FLETCHER,
His Attorney.

UNITED STATES OF AMERICA, *ss:*

Thomas C. Fletcher, attorney for Sempronius H. Boyd, the above claimant, being duly sworn, upon his oath states that the foregoing petition and the matters therein as stated are true to the best knowledge, information, and belief of affiant.

THO C. FLETCHER.

Subscribed and sworn to before me this 16th day of June, 1894.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

On the 19th day of November, 1894, the death of the said Sempronius H. Boyd having been suggested, the suit was revived in the name of Margaret M. Boyd, as his executrix.

14 III.—*Traverse, filed October 30, 1896.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petitions be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

15 IV.—*Findings of fact and conclusions of law, filed February 10, 1896.*

This case having been heard by the Court of Claims, the court upon the evidence find the facts to be as follows:

I.

October 1, 1890, Sempronius H. Boyd was commissioned as minister resident and consul-general of the United States for Siam. Boyd assumed the dual office, and performed his official duties until February 11, 1893. His salary was paid him until July, 1892.

II.

July 12, 1892, Boyd, being, as he was advised and believed, hopelessly ill, obtained a leave of absence, with permission to visit the United States. August 27, 1892, he arrived at his home in Missouri. His leave of absence expired October 26, 1892. After that date his health fluctuated until June 22, 1894, when he died. Plaintiff, Margaret M. Boyd, is Sempronius H. Boyd's widow and executrix.

III.

Before leaving Bangkok, believing his illness would terminate fatally, and being desirous to protect the interests of the Government during his absence and until the then expected arrival from the United States of Robert M. Boyd, whom Sempronius Boyd desired should act as consul-general, the latter called to his aid Lewis A. Eaton (now a plaintiff herein, who was then a missionary at Bangkok) and asked him to take charge of the consulate and its archives. Thereupon the following let-

ter, dated June 21, 1892, was written by Boyd, and the following document was signed by Eaton:

"U. S. LEGATION AND CONSULATE-GENERAL,
"*Bangkok, June 21, 1892.*

"KROM LUANG DEVAWONGSEE VAROPROKAN,
Minister for Foreign Affairs:

"MONSIEUR LE MINISTRE: It is with exceeding regret to me to be forced to abandon my diplomatic and consular duties at the Court of His Majesty, with the enjoyment, pleasure, comfort, and genuine friendship so marked and distinguished, which the representative of the U. S. fully appreciated and imparted to his Government.

"All the physicians advise me to go soon to a cold climate. The President has wired me to that effect. In 20 or 30 days I may be strong enough for a sea voyage, of which I will avail myself. I am authorized to designate and do designate L. A. Eaton vice-consul-general until I am able to assume. If not incompatible with public affairs, I beg you to so regard him.

16 "Monsieur le Ministre, I am too week and feeble to call in person, which I would so much like to have done, and expressed my thanks and that of my Government to the foreign office and attachés.

"With assurance of my high consideration, I have the honor to be, Monsieur le Ministre, your obedient servant,

"S. H. BOYD."

"KINGDOM OF SIAM, U. S. LEGATION,
"*Bangkok, June 23rd, 1892.*

"I, L. A. Eaton, citizen of the United States of America, residing in Bangkok, in the Kingdom of Siam, and being by the Hon. S. H. Boyd, U. S. minister resident and consul-general, because of sickness and inability to discharge the duties devolving upon him as such officer, have been appointed, empowered, authorized, and nominated to H. E. the President of the United States, acting consul-general for the Kingdom of Siam, and having formally accepted the same, I do solemnly swear that I will faithfully discharge the duties of the office, conform to the requirements of the State Department at Washington, D. C., preserve the property of the United States under my charge, and turn over and deliver at the termination of my official position everything belonging to the Government under my control. So help me God.

"L. A. EATON."

"KINGDOM OF SIAM, BANGKOK,
"*U. S. Legation, June 23rd, 1892.*

"L. A. Eaton, being this day appointed by me acting consul-general, was by me duly sworn to the facts in the statement above his signature preparatory to the discharge of his duties.

"Witness my hand and official seal day and date above.

[SEAL.] "S. H. BOYD,
"*Min. Res. and C. G., U. S. A.*"

Boyd believed he had authority for this action.

IV.

At the date of the letter aforesaid Sempronius H. Boyd was physically unable to perform the duties of his office, and Robert M. Boyd, who had been appointed vice-consul-general November 10, 1891, had not qualified as such officer, but had left Siam for the United States about March 30, 1892, and in June, 1892, was in the United States.

Robert M. Boyd arrived in Bangkok Feb. 11, 1893, and his recognition as vice-consul-general was asked of the Siamese Government on Feb. 13, 1893. This was done by Eaton in pursuance of a letter to Eaton dated Nov. 22, 1892, from the Secretary of State, who forwarded therewith Boyd's commission of Nov. 10, 1891. Boyd was recognized accordingly in May, 1893, and was in undisputed discharge of the duties of the office from and after May 18, 1893.

V.

Sempronius H. Boyd received leave of absence and left Siam for the United States July 12, 1892, and in due course arrived there. The period of sixty days after his arrival expired October 26, 1892. He did not return to his post.

VI.

Eaton acted under whatever authority was given him by the communication appearing in Finding III, and with the approval of the Department of State.

The Department acknowledged his communications and acted upon them as communications from a person authorized to perform the duties of minister resident and consul-general in the emergency then existing. Boyd, upon his departure from Bangkok, transferred the charge of the legation and consulate-general to Eaton. At the time of Boyd's departure there was in Siam no vice-consular officer regularly appointed and qualified to assume the official duties. Robert M. Boyd had been appointed to that position November 10, 1891, but he had not at
17 the date of the minister's departure from Siam given bond or qualified to assume the duties. The Department of State regarded the temporary appointment of Eaton as required by the emergency.

VII.

June 13, 1892, Eaton began the discharge of the duties imposed upon him by Sempronius H. Boyd; he took an oath of office June 23, 1892; from July 12, 1892, to and including May 17, 1893, he was in sole charge of the interests of the Government at Bangkok, and performed whatever duties were required there of either a minister resident or a consul-general, with the knowledge of the Department of State and with that Department's approval.

VIII.

September 2, 1892, Eaton executed (under instructions from the Department of State) an official bond calling himself acting consul-general of the United States at Bangkok; this was received at the

Department of State and was approved January 3, 1893; subsequently, under instructions from the Department of State, dated January 24, 1893, he executed another bond as vice-consul-general of the United States at Bangkok, which was approved by the Secretary of State April 23, 1893. Both of these bonds bore date June 13, 1892, with the knowledge and consent of Eaton's sureties thereon, and were so dated because of a pencil memorandum on each bond when received in blank by Eaton from the Department of State, directing him to insert the date of his appointment in the blank space reserved for the date.

IX.

Eaton rendered to the accounting officers of the Treasury his account for salary for the entire period of his service, in which he charged and claimed one-half of the salary of $5,000 per annum appropriated for said post of minister resident and consul-general, from July 12, 1892, to October 26, 1892; that is, from the departure of the minister to and including the date on which the leave of absence for sixty days (excluding transit time) expired, and the full salary at the rate of $5,000 per annum from October 27, 1892, to May 17, 1893, inclusive.

X.

Eaton also rendered with his salary account a return of all fees collected during the entire period of his service, both fees official and unofficial, including fees notarial and fees and fines received in the United States consular court at Bangkok, amounting in all to $245.41; these fees are set forth in Exhibit C to the petition. During the period in dispute in this case Eaton did not assume to act as interpreter or prison keeper nor assume to receive pay as such, nor did he receive pay other than as is shown in these findings; but it does not appear that he was replaced in either post, nor does it appear whether there were any actual services as interpreter or prison keeper to be performed, or that any other person performed service as interpreter or prison keeper.

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XI.

In the settlement of Eaton's salary accounts by the Treasury the total amount of fees received, to wit, $245.41, was charged to him and covered into the Treasury. The one-half salary from July 12, 1892, to October 26, 1892, amounting to $726.90, was suspended for "further information," which was thereafter furnished; but this sum remains unpaid. The full salary from October 27, 1892, to May 17, 1893, amounting to $2,792.35, as approved by the Department of State, was allowed and credited. Deducting from this $245 leaves in Eaton's favor a balance of $2,546.94, which was certified to his credit by the First Comptroller December 4, 1893, no part of which has been paid.

XII.

Eaton also rendered to the Department of State his account of disbursements from the contingent fund of the legation and consulate-general from July 1, 1892, to April 30, 1893, which was there approved.

In the settlement of said accounts by the accounting officers of the Treasury the sum of $5.73, expended by Eaton for candles and lanterns, was suspended for information, which was thereafter furnished, but said sum remains disallowed and unpaid.

XIII.

The items composing the sum of $3,456.98, for which Eaton prays judgment as hereinbefore set forth, are:

(a) Notarial and unofficial fees ($114.41) and consular court fees ($63), erroneously included as official consular fees, and charged to claimant per report No. 162708	$177.41
(b) One-half the salary of the post at Bangkok, from July 12, 1892, to October 26, 1892, suspended per report No. 162708, yet unpaid	726.90
(c) Balance found due and certified in favor of claimant by the First Comptroller December 4, 1893, per report No. 162708, no part of which has been paid	2,546.94
(d) Item of contingent expenses, suspended per report No. 162709, due and unpaid	5.73
Total	3,456.98

Among the fees aforesaid (in item "a") were two items for the settlement of the estates of John Robertson, $9.72, and that of J. M. Small, $58.19, no part of which has been paid.

CONCLUSION OF LAW.

Upon the foregoing facts the court find as conclusion of law that the petition of Sempronius H. Boyd's executrix be dismissed.

Judgment in favor of the plaintiff, Lewis A. Eaton, for $3,456.98.

19 V.—*Opinion of the court.*

DAVIS, J., delivered the opinion of the court:

While Sempronius H. Boyd held the dual office of minister and consul-general in Siam he fell seriously ill, and, obtaining the proper leave of absence, he returned to the United States, where he remained until his death, which occurred June 22, 1894. His statutory leave of absence with pay ceased October 26, 1892, after which date he had no claim to salary.

Before leaving Bangkok he asked Eaton (a plaintiff herein), then a missionary in Siam, to take charge of the consulate and its archives. Boyd wrote the minister of foreign affairs of Siam informing him of his contemplated departure, and that he designated Eaton "vice-consul-general." Two days later (June 23, 1892) Eaton took an oath which contained the statement that he had been "appointed, empowered, authorized, and nominated to" the President "acting consul-general for the Kingdom of Siam;" that he accepted the office and swore to faithfully discharge the duties of the office, conform to regulations, preserve the Government property, and "turn over and deliver, at the termination of my official position, everything belonging to the Government under my control."

The same day Boyd stated, under his hand and seal, writing as "minister resident and consul-general," that he had that day appointed Eaton acting consul-general. Previous to this (November 10, 1891) Robert

M. Boyd, a son of Sempronius Boyd, had been appointed vice-consul-general; he had not, however, qualified as such officer, and left for the United States March 30, 1892, whence he did not return. His appointment under these circumstances has no bearing upon this case.

The statute makes a salary allowance to ministers and consuls absent with leave for a period not exceeding sixty days after their arrival at their homes.

We have now to decide as to Eaton's status during Boyd's absence. Boyd, the minister, acted under the spur of necessity, as he was forced to suddenly leave his post, and having no secretary of legation to assume the duties of the office, he turned to Eaton for aid as a fellow-citizen in a city where few Americans could be found. In the appointment of Eaton, Boyd exercised all the power he possessed and intended to use all this power; the action was reported to the Department of State, and, as the Assistant Secretary said, "the temporary appointment of Mr. Eaton was therefore required by the emergency;" the Assistant Secretary further says as to Eaton's official dispatches, "they were duly acknowledged by the Department as communications from a person authorized to perform the duties of minister resident and consul-general in the emergency then existing." Eaton took charge of the office and performed the duties of minister resident and consul-general during Boyd's illness until the latter's departure from Bangkok, and for this period Eaton makes no claim for compensation. July 13, 1892, Eaton informed the Department of Boyd's departure and that he had assumed charge of the legation and consulate-general; he remained in charge to (and including) May 17, 1893, during this time performing the duties of the combined offices. A form of bond was sent Eaton by the Department of State describing him as "acting consul-general," and this was afterwards amended by the Department, when he was described as "vice-consul-general." Both bonds were approved by the Department of State as required by law. (R. S., sec. 1698.)

It has long been settled that a vice-consul, acting during the absence of his superior or during a vacancy in the office, shall be compensated from the salary of that officer. This was settled before the act of August 18, 1856, the act reorganizing the consular service. In the case of Coxie, who, without regular appointment, remained in charge of the consulate in the Barbary States after the death of his father (the consul), the Attorney-General advised the President that the salary be paid him, saying:

"The public service requires that the duties of the office should be discharged by someone, and where, upon the death of the consul, a person who is in possession of the papers of the consulate enters on the discharge of its duties and fulfills them to the satisfaction of the Government, I do not perceive why he should not be recognized as consul for the time he has acted as such and performed the services to the public, and if he is so recognized the law of Congress entitles him to his salary." (Op. Atty. Genl., vol. 2, p. 521.)

June 3, 1856, Mr. Marcy, Secretary of State, asked of the Attorney-General the following questions:

"1. When a consul is absent from his post, is the person whom the consul, with the sanction of the Department, has left in charge of the consulate and performing the duties entitled to the statute salary?

"2. If a consulate becomes vacant by death, resignation, or removal of the incumbent, is the individual who shall have been placed by a minister or other authorized agent of the Government in charge of the office entitled to the salary?"

Mr. Cushing, in answer to Mr. Marcy's inquiries, held "that the substitute consul, or locum tenens, is to be paid out of the salary or to go uncompensated," and said:

"1. A substitute or vice-consul left in charge of the consulate during the temporary absence of the consul is to be compensated out of the statute emoluments of the office, subject to the regulations of the Department.

"2. An acting consul, in charge of a consulate during actual vacancy of the consulate, is entitled to receive the statute compensation of the office." (7 Op. Atty. Genl., 714; see also Wharton's Digest, vol. 1, sec. 118, p. 772.)

Section 1695 (R. S.) authorizes the President—

"To define the extent of country to be embraced within any consulate or commercial agency, and to provide for the appointment of vice-consuls, vice-commercial agents, deputy consuls, and consular agents therein, in such manner and under such regulations as he shall deem proper, but no compensation shall be allowed for the services of any such vice-consul or vice-commercial agent beyond nor except out of the allowance made by law for the principal consular officer in whose place such appointment shall be made."

Section 1703 (R. S.) provides that:

"Every vice-consul and vice-commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer."

Vice-consular officers are those who replace the chief of post during his absence, and are not to be confounded with deputy consular officers who act during the presence of the superior. (Cons. Reg. of 1888, paragraphs 19 and 31, pp. 7 and 13.) Compensation of such officers is thus fixed by the regulations (sec. 471, Reg. of 1888):

"1. In case the principal officer is absent on leave for sixty days or less in any one calendar year and does not visit the United States, the vice-consular officer acting in his place is entitled to one-half of the compensation of the office from the date of assuming its duties, unless there is an agreement for a different rate, the principal officer receiving the remainder. But after the expiration of the sixty days, or after the expiration of the principal's leave of absence (if less than sixty days), the vice-consular officer is entitled to the full compensation of the office.

"2. If the principal visits the United States on such leave and returns to his post, the foregoing rule will include the time of transit, both from and to his post, as explained in paragraph 460. But if the principal does not return to his post, either because of resignation or otherwise, the rule will embrace only the time of absence not exceeding sixty days, together with the time of transit from his post to his residence in the United States."

21 While section 1742 of the Revised Statutes provides that:

"No diplomatic or consular officer shall receive salary for the time during which he may be absent from his post, by leave or otherwise, beyond the term of sixty days in any one year; but the time equal to that usually occupied in going to and from the United States, in the case of the return on leave of such diplomatic or consular officer to the United States, may be allowed in addition to such sixty days."

The compensation of a vice-consular officer acting during his principal's absence (when alone he can act) is paid out of the compensation of his principal, and continues during the principal's absence, even if that absence exceeds the statutory sixty days. (12 Opin. Att. Gen., 410.)

In settling the accounts of Boyd and Eaton the Treasury allowed Boyd full salary to (including) July 11, 1892, and one-half salary after his departure from Siam (July 12, 1892) to (including) October 26, 1892, when his sixty days' leave with pay (excluding transit time) expired.

The statute stopped Boyd's salary October 26, 1892, which was sixty days after his arrival in the United States, and his claim for salary after that date and to February 11, 1893, was not approved by the Department of State nor paid, nor should it be.

Eaton's accounts as vice-consul-general were approved by the Department of State, being presented upon the theory that he was entitled to full salary (at the rate of $5,000 per annum) from October 27, 1892, to (including) May 17, 1893. The Treasury did not allow the claim made by Eaton for one-half salary from July 12, 1892, to October 26, 1892, to wit, from the date of Boyd's departure from Siam to the date when his leave with pay expired. The reason for this was that the Comptroller understood there was an agreement between Boyd and Eaton by which Eaton was to receive only the salaries of interpreter and prison-keeper to the legation.

Eaton gave a bond as soon as he could. The form of this bond was prescribed by the Department of State, which later became dissatisfied with its form and sent him another bond in blank, which he diligently perfected and returned to the Department. It is suggested that he is not entitled to the salary of the office for the period between his appointment by Boyd and the date of the approval of the bond, although he had entered upon the duties of the office and performed them during the period in question.

The general rule is that a vice-consul is entitled to compensation when his chief is absent, and then from the date of assuming the duties of the office. (Cons. Reg. 1888, sec. 471, clause 1, p. 167.) If Eaton had been appointed in due course by the Secretary of State prior to entering upon the duties of the office there could be no question now as to his rights to the pay. But as he was designated by Boyd prior (necessarily) to confirmation by the Department and had to await approval from that Department—instructions and a form of bond—a period necessarily elapsed between his designation to the office and the approval of his bond by the Department. In the nature of things this was unavoidable. It is prescribed by the regulations and has long been the custom for the pay of a vice-consular officer to begin upon the date when he assumes the duties of his office; that is, upon the departure of his superior officer, and this custom is of great if not controlling weight. (U. S. v. Moore, 95 U. S., 763; U. S. v. State Bank, 6 Peters, 29; U. S. v. McDaniel, 7 id., 1.)

22 It is true that the vice-consul must "before he enters on the execution of his trust give bond with such sureties as shall be approved by the Secretary of State." (Sec. 39, p. 16, Cons. Reg., 1888.) And this bond must be received, approved, and filed before his accounts can be adjusted at the Treasury. This, however, does not necessarily affect the right to compensation during the period between appointment and receipt of bond.

We therefore conclude that Eaton is entitled to one-half the salary of the post from July 12, 1892, to October 26, 1892, and to full salary from that date to May 17, 1893. (Rex v. Lonsdale, 1 Burrow, p. 447; United States v. Bradley, 10 Peters, p. 343; United States v. Linn, 15 Peters, p. 313; City of Chicago v. Gage, 95 Ill., p. 593; State v. Toomer, 7 Rich. S. C. Law, p. 216; State v. Churchill, 41 Mo., p. 41; Sprowl v. Lawrence, 33 Ala., p. 674; People v. Holley, 7 Wendell (N. Y.), p. 481; State v. County Court, 44 Mo., p. 230; State v. Porter, 7 Ind., p. 294; State v. Falconer, 44 Ala., p. 696; State v. Colvig, 15 Oreg., p. 57; State v. Peck, 30 La. An., p. 280; Kearney v. Andrews, 10 N. J. Chan., p. 70; State of Maryland v. Commissioners, 29 Md., p. 516; Speake v. United States, 9 Cranch., p. 28; Ross v. Williamson, 44 Ga., p. 501; State v. Hadley, 27 Ind., p. 496.)

In United States v. Flanders (112 U. S., p. 88), the Supreme Court held:

"If he is appointed, and acts and collects the moneys and pays them over, and accounts for them, and the Government accepts his services and receives the moneys, his title to the compensation necessarily accrues unless there is a restriction growing out of the fact that another statute says that he must take the oath 'before being entitled to any of the salary or other emoluments' of the office. But we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate, the commissions as compensation, does not arise until he takes and subscribes the oath or affirmation, but that when he does so his compensation is to be computed on moneys collected by him from the time when, under his appointment, he began to perform services as collector, which the Government accepted, provided he has paid over and accounted for such moneys" (p. 91).

On this branch of the case Eaton will recover one-half salary from July 12, 1892, to October 26, 1892, amounting to $726.90; full salary from October 27, 1892, to May 17, 1893 ($2,792.35), less the fees charged to him, to wit, $245.41, that is to a balance of $3,273.84.

As to the smaller items of his account, these are for fees received for unofficial and notarial services, and should be allowed. (U. S. v. Mosby, 133 U. S., p. 287; Stahel v. U. S., 26 C. Cls. R., p. 193.)

The sum of $63, fee and fines, collected in the consular court are for services not required by statute nor specified as official in the consular regulations, and should be allowed. (Sec. 4120, R. S.; sec. 1396, p. 472, U. S. Cons. Reg. of 1888.)

These fees were expended for consular court expenses, for which Eaton has not been repaid. The petty item for lights upon the King's birthday was approved by the Department of State, and appears to be a charge within the discretion of that Department; it is therefore allowed.

Judgment in favor of Plaintiff Eaton for $3,456.98.

Petition of Sempronius H. Boyd's administratrix dismissed.

23 VI.—*Judgment of the court.*

MARGARET M. BOYD, EXECUTRIX OF SEMPRONIUS H. Boyd, decd., and Lewis A. Eaton,
vs.
THE UNITED STATES.
} Nos. 18527 and 18691 consolidated.

At a Court of Claims, held in the city of Washington on the 10th day of February, A. D. 1896, judgment was ordered to be entered as follows:

That the petition of Margaret M. Boyd, executrix of Sempronius H. Boyd, decd., be dismissed, and do order, adjudge, and decree that the said Lewis A. Eaton do have and recover of and from the United States the sum of three thousand four hundred and fifty-six dollars and ninety-eight cents ($3,456.98).

BY THE COURT.

24 VI.—*Application for and allowance of appeal.*

LEWIS A. EATON
v.
THE UNITED STATES.
} 18691.

From the judgment rendered in the above-entitled cause on the 10th day of February, 1896, in favor of the claimant, the defendants, by their Attorney-General, on the 16th day of April, 1896, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Attorney-General.

Filed April 16, 1896.
Allowed in open court, April 20, 1896.

WILLIAM A. RICHARDSON,
Chief Justice.

25 In the Court of Claims.

MARGARET M. BOYD, EXECUTRIX OF SEMPRONIUS H. Boyd, decd., and Lewis A. Eaton,
vs.
THE UNITED STATES.
} Nos. 18527 and 18691 consolidated.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinion of the court, of the judgment of the court, of the application of the Attorney-General for the allowance of an appeal to the Supreme Court of the United States and the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 7th day of May, 1896.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16295. Term No. 174. The United States, appellant, vs. Lewis A. Eaton. Court of Claims. Filed May 9, 1896.

No. 174.

Brf. of Atty. Gen.l (Pradt v. Russell)
for Appellant.

Filed Oct. 11, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

UNITED STATES, APPELLANT,
v.
LEWIS A. EATON, APPELLEE. } No. 174.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

UNITED STATES, APPELLANT,
v.
LEWIS A. EATON, APPELLEE. } No. 174.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims, and the usual findings of fact have been made. The claim is for salary and fees by one who, in the absence on leave and after expiration of leave of the minister resident and consul-general at Bangkok, Siam, acted in his place. The minister undertook to appoint him "acting consul-general" on June 23, 1892, and on July 12 following left Siam, and claimant acted until May 17, the minister not returning. The vice-consul-general, appointed in 1891, had previously left Siam. He was absent until February 11, 1893, and did not take charge under his appointment until May 18, 1893, when the claimant had ceased to act.

The Court of Claims has given judgment upon the petition of claimant for salary and fees as to a regularly appointed vice-consul-general, treating the minister resident and consul-general's salary as that of a consul-general. The appellant denies that the Government owes the claimant for any salary or fees.

ASSIGNMENT OF ERRORS.

1. The court erred in not dismissing the petition of claimant.

2. The court erred in allowing for any salary or sums of money as accruing prior to the approval of the bond of claimant as vice-consul-general.

3. The court erred in allowing for any salary or sums of money as accruing prior to the approval of the bond of claimant as acting consul-general.

4. The court erred in allowing any sums to the claimant for diplomatic services.

5. The court erred in treating the salary of minister resident and consul-general as salary of a consul-general only and making its allowance to claimant as vice-consul-general accordingly.

6. The court erred in allowing Eaton, not being a minister, consular officer, or consular notary, to recover fees illegally collected and voluntarily paid into the Treasury.

BRIEF OF ARGUMENT.

It is impossible to see, in the opinion or findings of the Court of Claims, what that court considered "Eaton's status during Boyd's absence." (R., p. 13.) It finds that

he performed, under whatever authority Boyd's paper gave him (finding 6, R., p. 10), whatever duties were required in Siam of a minister resident and consul-general, with the knowledge of the Department of State and with that Department's approval. (Finding 7, R., p. 10.) This performance and the approval of it, if Eaton was a consular officer of any kind, were violations of the important law forbidding such officers to perform diplomatic functions. (R. S., 1738.) It finds, also, that the claimant gave bond as "acting consul-general," and that the State Department approved such bond (finding 8, R., p. 10); also that he afterwards gave bond as vice-consul-general, and that the State Department approved this also (Ibid.). But an "acting consul-general" is not or would not be an acting minister resident; and as for a vice-consul-general, one had already been appointed, and there was no intention to remove him, but a clear intention to retain him in office, which was done. The intention was that Eaton should act only until R. B. Boyd, the vice-consul, who was expected back, should reach Siam. (Finding 3.) He was made interpreter and prison keeper (finding 10), and S. H. Boyd disputed his claim to pay as vice-consul-general. (R., p. 7.)

It is not the fault of the Court of Claims that, having determined that Eaton's claim should be allowed, it was at a loss upon what acts of Boyd or the State Department to settle as fixing the status of Eaton. It is the fault of the facts and the law.

Therefore it is that the same vagueness or uncertainty which prevails in the court's views (R., p. 13) is

seen in the views of the State Department (findings 6 and 8 p. 10), and, going still further back, we find it in the views of the minister resident and consul-general (finding 3, pp. 8, 9).

We shall endeavor to show that all this is because there was no way of reconciling any such pretended appointment of Eaton with the law of the land.

R. S., 1695, provides that vice-consuls, etc., shall be appointed only under regulations to be made by the President, providing for their appointment and the manner of it.

The President's regulations are to be found in Consular Regulations, 1888, sections 36 and 87. The former prescribes the mode of appointing regular vice-consuls, etc.; the latter prescribes the mode of appointing "emergency" vice-consuls. There were no other regulations, and consequently vice-consuls were forbidden to be appointed otherwise than under these. It would be a violation of law to attempt any other appointment.

Examining the facts of this case, we find that no attempt was made to act under section 36, and that no one concerned relied upon that section.

The clearest proofs that the State Department did not are to be found in the direction to Eaton to insert in his bond the date of his appointment and in the fact that R. B. Boyd filled the office of regular vice-consul-general. (Finding 4, p. 10.) He had been appointed in 1891; he was not removed or intended to be removed or replaced by Eaton in that office, but proceeded to qualify and serve under his appointment of 1891. (Ibid.)

The clearest proofs that the elder Boyd had no intention to appoint a successor to R. B. Boyd are, perhaps, the total want of a pretense of authority in the instructions and regulations for him to do so, the clear regulations and instructions showing that he was not to do so, and his use of the title "acting consul-general." (Finding 3, p. 9.) Boyd evidently did not intend to appoint Eaton vice-consul-general, because R. B. Boyd had been appointed to that office, and S. H. Boyd desired that he should keep that office. (Finding 3.)

Boyd did not attempt to act, therefore, under section 36, and the State Department could not ratify what Boyd did not attempt to do, and it did not as a matter of fact intend to appoint or recognize Eaton as the vice-consul-general contemplated by section 36. Section 36 did not authorize the Secretary to appoint two vice-consuls-general at Bangkok, and the Department did not intend to remove R. B. Boyd by appointing Eaton. (Findings 4 and 6, p. 10.)

It is perfectly clear that the validity of Boyd's act was relied upon by Eaton. He asked no confirmation or appointment at the hands of the State Department. Boyd believed he had authority to appoint as he did, and Eaton, being merely a missionary, was doubtless no wiser. (Foot of p. 9.) He seems to have asked no questions of the State Department, intending, no doubt, to put in his accounts when all was over for as large an amount as any possible theory of his status would appear to justify, and to leave that status to be inquired into at that time.

The State Department contented itself with acknowledging his letters, approving his bond, and letting him alone (findings 6 and 4, p. 10) until Vice-Consul-General R. B. Boyd could reach his post, an event which the Department took pains to bring about at as early a day as practicable (finding 4, p. 10). The bond was required and approved as a wise precaution, but the Department was noncommittal as to the status of Eaton, leaving Boyd's act to avail if it could and fail if it must.

As for an appointment as "emergency" vice-consul-general, the President's Regulations, 1888, section 87, provide that if "such a vacancy should occur in a consulate-general, the temporary appointment will be made by the diplomatic representative."

It is under this regulation or none that all concerned believed that Boyd was attempting to act, and the court has found accordingly. (See the beginning and end of finding 6, R., p. 10.)

It does not authorize the Secretary of State, but the diplomatic representative abroad, to appoint, and under R. S., 1695, is the exclusive authority for such temporary appointments. Any temporary appointment not under this section is not only without law, but forbidden by law, since the passage of R. S., 1695.

But the regulation failed to provide for the circumstances which actually arose in this case, and the court has no right to legislate for those circumstances.

Under the regulation there must be a vacancy in the consulate-general and vice-consulate-general, and it must be one requiring the appointment of a person to perform

temporarily the duties. The diplomatic representative is made the judge of the necessity, for he is made the appointing power. The President's regulation has given the head of the Department no power to do anything on the subject.

If the President has not authorized the head of the Department to make such an "emergency" appointment, the head of the Department is without power to ratify what he could not do nor authorize to be done.

Now, Eaton could not be appointed under section 87, because there was no vacancy in the office of consul-general, or because there was no diplomatic representative in Siam. Boyd had been appointed minister resident and consul-general. It was one office with two aspects. He was at Bangkok sick. He was sick in his capacity as a diplomatic officer as well as in his capacity as consul-general. He could not be present, absent, sick, in office, or out of office as consul-general and not as minister resident, or vice versa.

But clearly, when he undertook to appoint Eaton "acting consul-general," there was no vacancy in the office of consul-general, to say nothing of R. B. Boyd being then vice-consul-general (*Marbury* v. *Madison*, 1 Cranch, 137), a proposition which the claimant can not consistently deny or safely admit. Therefore the regulation of the President did not authorize him to make the temporary appointment.

No one else was authorized to judge of the necessity to appoint or to make, ratify, confirm, or in any way meddle with any appointment under that regulation, or to suspend or amend the regulation.

Therefore, the act of Boyd was a violation of section 1695, R. S., and no rights can arise from it. Eaton is presumed to know the law, and participated in an attempt to violate it. He can base no claim on such a proceeding.

If Eaton should seek to rely upon an implied contract arising out of the action of himself and the State Department, it is a sufficient answer that where an express contract is forbidden the law will hardly imply an unexpressed one. (*Cary* v. *Curtis*, 3 How., 249.) No contract, conduct, or custom forbidden by law is good ground of action. (See also 20 Opin. 92, R. S., 1760, 3678, 3679, 3732.)

He had notice by the law and President's regulations referred to in it what could and what could not be done; and if he volunteered under a mistake of law to perform services forbidden to be engaged and performed, he is no worse off than a man who pays money under a mistake of law and can not recover it back.

The notion that a vice-consul is forbidden to be appointed otherwise than as the President directs, except in case of emergency, and then any one can appoint one or the various officials of the State Department bind the Government to pay one by ratification, estoppel, or otherwise, is wholly fallacious. Temporary consuls are all "emergency" men. The law and this regulation undertake to provide for all emergencies, and if there is a *casus omissus* it is for the President to amend his regulations or Congress to amend the laws. Until they do so, R. S., 1695, says no vice-consul shall be appointed in that case.

But let us suppose Eaton was in some way legally appointed vice-consul-general. He could not enter upon

the discharge of his duties as such until he had given an appropriate bond and it had been approved. Then only was he a bonded officer, and no other is permitted to act. It was not intended by Congress that a person should exercise the functions of such an office without an approved—that is, operative—bond. (*United States* v. *Le Baron*, 19 How., 77.) The giving and approval of the bond was a "condition precedent" to taking the office, and there can be no acting in the office until approval. (Ibid.) Referring to regular vice-consuls appointed under Reg. 36, Reg. 47 says they "are not authorized to take charge of their offices or enter upon their duties until the bond has been executed. Until that formality is complied with, the accounts for their compensation will not be adjusted," etc. "Executed" thus clearly means completed as a binding obligation; that is, offered and accepted. Reg. 88 requires the same in this respect of temporary vice-consuls as of permanent officers. The word "approved" is found in the new regulations of 1896 (sec. 51), and they refer to 19 How., 73, and 14 Op., 7, which latter says that a bond speaks only from approval (sec. 35).

But, while a bond as "acting consul-general" was offered and accepted, the acceptance was withdrawn upon objection from the Treasury and the bond withdrawn. (Finding 8, p. 10, and petition, par. 4, p. 1.) It was not until April 23, 1893, that a bond as vice-consul-general was accepted and became operative (finding 8, p. 11), and not until after that that the pretended appointee could legally act, if he ever could.

It is supposed that *United States* v. *Flanders* (112 U. S., 88) is in point; but that case merely decides the

intent of Congress as to the method of computing the compensation of a customs officer regularly appointed and ultimately regularly qualified who was to be paid a percentage of moneys paid over to the Government. The compensation was by a percentage to be computed on moneys "paid over and accounted for under the instructions of the Treasury Department" not to exceed $10,000 a year. The collector paid over and accounted for moneys, and the point was made that he was collecting money from March 11 and did not take oath and give bond until May 15, and that such moneys should not be treated as part of the sum on which to calculate his percentage. The court held the contrary intended, and that is all that was decided. It was not designed to overrule the doctrine of *United States* v. *Le Baron* as to the intent of Congress. The prohibition in R. S., 1697, against *receiving the commission* shows the intent of Congress here. *United States* v. *Bradley* (10 Pet., 342), *United States* v. *Linn* (15 Pet., 270), *Speake* v. *U. S.* (9 Cranch, 28), *City of Chicago* v. *Gage* (95 Ill., 593), *State* v. *Toomer* (7 Rich. S. C. Law, 216), *Sprowl* v. *Lawrence* (33 Ala., 674), *State* v. *Porter* (7 Ind., 204, were governed by the principle of estoppel by deed, or attempts of sureties to avoid their bonds, after regular commission, service, and compensation of officers, because the bonds were informal. The other cases cited by the court seem to show that bonds may be given or oaths taken after the statutory time, but not that a man may enter upon the duties before qualifying when the law says otherwise. (See *State* v. *Colvig*, 15 Or., 57.) These cases seem to leave no doubt that R. B. Boyd filled the office of vice-

consul-general at the time Eaton claims to have occupied it. But, however this may be, the President, acting under R. S., 1695, made a regulation, certainly not inconsistent with law, wherein he prescribed that vice-consuls were not authorized to take charge of their offices or enter upon their duties "until" the bond had been executed, and section 88 shows that this was intended to apply to temporary vice-consuls.

This does not seem to be going beyond the legislative power granted to the President by R. S., 1695, and if valid it is the law applicable to this case. It was a violation of law to enter upon the duties or take charge *until* the bond was given and approved. Of course, no amount of oaths or bonds can supply the want of an appointment.

On this branch of the case the Comptroller's Office is desirous of an expression from this court for its guidance in other cases. (See 10 Opin., 250.)

It does not appear what is meant by "the State Department" in the findings of the court, and this court will take judicial notice that correspondence with consuls-general and acting consuls-general does not imply the personal act of the Secretary of State, which personal act is necessary to an appointment. The assistant secretaries correspond with them almost invariably. (Cons. Reg., 1896, secs. 129, 120, 132; 18 Stat., 85, par. 4.)

If it will be presumed that what purported to be a vice-consul-general's bond was personally approved by the Secretary of State, because R. S., 1698, requires him to approve the sureties, this presumption of his personal action can not go beyond that.

Suppose an "emergency" vice-consul-general had been appointed, it did not personally concern the Secretary of State beyond (if at all) this approval of the sureties. It was not his affair, but that of the diplomatic representative.

Therefore, there is no reason to believe the facts and circumstances set out in the court's findings 6, 7, and 8 as being known to the Department, known personally to the Secretary of State. If the sureties on the bond were deemed sufficient, his duty began and ended when he said so.

This being so, there is no reason to believe that the Secretary of State had personally any information about Eaton or his supposed appointment by Boyd, the circumstances attending it, whether Eaton intended to claim pay from the Government, or what status he would pretend to have. That "the Department was fully informed" as to all this is not stated in the findings. What Eaton claimed to be or to receive did not appear until his accounts were put in, after he had ceased to act. If, therefore, the doctrine of ratification could apply to the facts in the case, the principle must be kept in mind that there must be full knowledge concerning an act, or even an undoubted ratification will not be binding. The only reference to the Secretary of State in the findings (R., p. 10) shows him on November 22, 1892, recognizing R. B. Boyd as vice-consul-general and seeking to get rid of Eaton.

But, again, if the Secretary of State, who alone (and not all parts of the Department of State) had authority to select and appoint vice-consuls—a high per-

sonal trust which no subordinate instrument could discharge for him—does not appear to have known anything about Eaton and his pretended appointment by Boyd, except that he had sent on a bond, it does not appear that the President ever even heard of Eaton.

We have heretofore assumed that Consular Regulations, sections 36 and 87, were intended to be delegations of Presidential power under R. S., 1695, to the head of the Department in one case and the diplomatic representative in another, and that R. S., 1695, intended to and could authorize such delegations.

We come now to the consideration of this question, not in the light of a book prepared by subordinates in the State Department, but in that of the Constitution.

The Constitution, it is submitted, warrants no such proceedings. It places the power of appointing consuls, ambassadors, and judges of the Supreme Court as on a level and solemnly reposes all in the President and Senate acting together.

A vice-consul is a consul within the meaning of that instrument. He is not a subordinate or inferior officer. He is not a deputy consul, consular agent, or clerk to a consul; he is a consul. Being a consul, his appointment can not be vested by Congress "in the President alone" or "the head of a Department" or in "the courts of law," the sole possible depositaries of the appointing power.

The Constitution, in this matter of appointing, recognizes no distinction of greater and inferior among ambassadors, consuls, and judges of the Supreme Court. It is enough that a man is an ambassador or minister. There

is no inferior officer *among* them—there may be inferior officers *to* them. But a vice-consul-general is essentially a consul in control over other consuls, whether temporarily acting or temporarily in office or permanently. He must therefore be appointed by the President and confirmed by the Senate.

This whole subject is learnedly and ably discussed by the Attorney-General in two opinions in 7 Opin., and from some loose language which crept into one of them, has come the failure to distinguish vice-consuls as defined by law *after those opinions were written* (see R. S., 1674, par. 3) and vice-consuls of France and other countries, who are subordinate or deputy consuls—aids to and instruments in the hands of the real consul and employees of his own acting in his name in his absence.

The general logic of those opinions exempts the appointing power as to consuls at small ports and large, temporary and permanent, from the clause in the Constitution about inferior officers. That clause refers to "other officers," not to inferior ambassadors, ministers, consuls, judges of the Supreme Court. All these are first set apart, by reason of the nature of their offices, not their superiority, and it is other officers left to be provided for by law that are classified as inferior. Otherwise, we have the anomaly that Congress can vest in the courts of law or head of any Department the appointment of some of the immediate instruments of intercourse between the Executive and foreign countries, on the pretext that they are inferior officers, because they are temporary officers. Congress might establish temporary consulates

or vice-consulates at places with which the President and Senate did not think it best to have any intercourse, and could cause the Secretary of the Treasury or some court of law to appoint to them.

Within the meaning of the Constitution an ambassador, temporary or permanent, could not be an inferior officer any more than a judge of the Supreme Court could. They could have inferior officers with them or under them; but they themselves were to be appointed by the treaty-making power, the combined power intrusted with foreign relations, and not the President alone, the head of some Department selected by Congress, or some court. The President alone could no more bind the Government by attempting to make a consul than by attempting to make a treaty.

From the Second Congress until 1855 no statute provided for the appointment of any other kind of consular officers than consuls and vice-consuls. These were appointed by the President and Senate and were required to give bond before entering upon the discharge of their duties. (*Dainese* v. *United States*, 15 C. Cls. R., 75, 76.) They were independent officers. The appointment of a consul "will not revoke the commission of vice-consul; it will only suspend his functions during the continuance of the consul within the limits of his jurisdiction. * * * It is understood that consuls and vice-consuls have authority, of course, to appoint their own agents in the several ports of their district, and that it is with themselves alone those agents are to correspond." (Ibid., quoting 3 Jefferson's writings, 188.)

But before 1855, besides these officers there had grown up various others, appointed in various ways, and mentioned in acts of Congress. In 1855 an act was passed remodeling the system. It said nothing about the manner of appointing vice-consuls. Shortly after its passage the Attorney-General, having been asked about the compensation of a person left in charge by the consul, with the sanction of the Department, said that under the fee system which had up to that time prevailed, "the business of the office proceeded on the general responsibility of the consul. The fees were collected and accounted for in his name. He retained his consular establishment. And the duties were performed by the vice-consul as the substitute of the consul, upon such agreement as to the compensation of the former as the parties might have entered into, with the sanction, express or implied, of the Department. When the consulate was actually vacant by the death of the consul or otherwise, and the duties were discharged by an acting consul under the approval of the Department, the latter received the fees to his own benefit, precisely the same as if he had been commissioned as consul." (7 Op., 714.)

All this the Attorney-General derives from the practice of the Department, and he thought this practice "affords a rule of analogy applicable to the enumerated consuls," the salaried consuls of the act of 1855. Under that act the fees belonged to the Government and it followed that the *locum tenens* "is to be paid out of the salary or go uncompensated." "Under the old system the consul, if absent, paid an agreed compensation to his

vice-consul out of his own official compensation in fees; under the new it must be paid by him as before, but not out of his salary. In the present case the consul has additional scope for the compensation of his vice-consul in the notarial and other nonconsular fees, which a consul may receive without accounting therefor to the Government." The conclusion was that under the analogy of the old practice the Department could regulate the matter, and that the temporary appointee could "now receive the salary attached to the same, if such is the will of the Department."

It thus appears that a person was permitted to be left in charge of the consulate, but he was not regarded as having the consular office; the responsibility remained with the consul, all was done in his name, and the person was paid by him, not by the Government. Such a person was nothing more than a personal servant of the consul, permitted to remain in his place, but not act in his own name. Also, that in case of vacancy by death or otherwise, an acting consul was permitted to collect the fees, and by analogy would have been allowed something from the salary, "if such was the will of the Department."

Referring to this situation of affairs, prior to and after the law of 1855, the Court of Claims well says:

> The act of 1856 first brought order out of this chaotic, crude, and to some extent contradictory legislation; separated the consular service into distinct grades; defined the powers, duties, and compensation of each, and provided a mode for the appointment of each. It is therefore quite clear that Congress prior

> to 1856 did not attach definite ideas and significations to the terms which it used in order to describe grades in the consular service. The Executive Departments were equally lax and vague. * * * The Department of State is found to be recognizing as vice-consuls persons named and appointed by consuls, serving in the consulate contemporaneously with the consuls themselves, without warrant of appointment from the Department. We are constrained to think that the early practice was in harmony with the requirements of the Constitution, and that, in the absence of law authorizing a departure from that practice, it should be followed. The claimant, having been appointed vice-consul without the approval of the Senate, is not entitled to be regarded as the lawful incumbent of the office, and can not recover, etc. (*Dainese* v. *United States*, 15 C. Cls. R., 77.) The word consul has two meanings. In its more limited sense it denotes an officer of a particular grade in the consular service; but in the second article of the Constitution and in the third article * * * the word is used in a broader generic sense, and denotes all consular officers of whatever grade. (Ibid.)

How a law was to authorize a departure from the requirements of the Constitution, e. g., the one in question necessitating approval by the Senate, the court does not explain.

The act of 1856 was intended to cover the whole ground, to reorganize the whole consular system, and has been carried into the Revised Statutes. It defines vice-consuls as to "denote consular officers, who shall be substituted, temporarily, to fill the places of consuls when they shall be temporarily absent or relieved from duty."

It forbids the appointment of such consular officers "otherwise than under such regulations as have been or may be prescribed by the President." It prescribes the bond of such consular officers; it provides for their compensation out of the allowance by law for the principal officer and not otherwise, and entitles them to so much thereof as the President may determine, the principal officers to be entitled to the residue.

It can not be doubted, after this law, that a person substituted temporarily to fill the place of a consul relieved from duty is an officer of the United States. He gives bond as such and he is paid, not by the consul, but by the Government. The consul is not responsible for him; he acts in his own name and by virtue of his vice-consular appointment. (*In re Herres*, 33 F. R., 165, Brewer, J.)

No practice or act of Congress can make an officer so defined anything but a consular officer within the meaning of the Constitution. The President must appoint and the Senate confirm him. If he were (as he is not) an "inferior officer," Congress could at most vest his appointment in the President alone, or the head of a Department or a court. Only Congress could vest it in anyone.

Having so defined the vice-consular office and made it a consular office in fact, Congress could not at the same time, even if it were an inferior office, vest the appointment in a diplomatic officer abroad. It can not authorize the President to so vest it or to vest it in any one.

If R. S., 1695, must be held to mean that the *President* may vest in the head of the State Department, or a

diplomatic representative, the appointment of such an officer it is unconstitutional, whether he is an inferior officer or not. It no more requires such a construction than does R. S. 1753.

Boyd was temporarily absent or relieved from duty. Eaton was appointed to fill his place temporarily. He was within the definition of a vice-consul, and therefore within the prohibition to appoint any vice-consul otherwise than under the regulations of the President. It was just such irregular and unauthorized appointments that the prohibition was introduced to put a stop to, and if it does not act upon them it can not have any effect. They constituted the only supposable evil which Congress sought to remedy by the following law of 1856 (R. S., 1695): "No vice-consul, vice-commercial agent, deputy consul or consular agent, shall be appointed otherwise than under such regulations as have been or may be *prescribed* by the President." *Prescribed* means what it says, and the whole sentence fits the case of Eaton as well as if made with foreknowledge of it.

The intent of the law was, or must be held to be, that the President might make regulations for legal and constitutional appointments, and that beyond them there should be no open ground for the old irregular appointments by any and every body in any and every manner.

If the President's regulation 87 is legal and constitutional, the circumstances did not give rise to a case under it; if it was illegal or unconstitutional, then no way remained but under regulation 36, and if that was not acted under or was illegal or unconstitutional, and it was the latter if the President meant to vest any appointing

power in the head of a Department, then there can be no pretense of a basis in it for Eaton's appointment.

The Court of Claims in 1879 seems to have understood that by the act of 1856 (which includes R. S., 1695) Congress had vested the appointment of inferior consular officers in "the President alone." (*Dainese* v. *United States*, 15 C. Cls. R., 75.) That seems to be a reasonable and is a constitutional construction of the law if we are wrong in thinking the Senate must consent and advise. Even regulation 36 might be interpreted to mean "the President alone" where it says Secretary of State; for it is addressed to consuls, and reminds them, not so much that the Secretary appoints, as that they do not appoint, vice-consuls.

It is not uncommon to use "the Department" or "the Secretary" in such cases as a convenient way to distinguish the acts of consuls, collectors, etc., from those of the executive superior, whether meaning the head of the Department or the President, who is in charge over the Department and directs the head of it.

This very practice may have given rise to the illegal regulation 36, if it does mean that the head of the Department is vested by the President with the appointing power. If it means that the President himself appoints, then he must do so personally, for the Constitution and the nature of the act equally forbid the head of a Department to be regarded as identical with the President alone in the matter of appointing officers.

If, prior to the act of 1856, a person appointed by a consul as "my vice-consul" when about to take leave of absence, who took charge and performed the duties as

vice-consul with the knowledge of the legation and Department of State, which continued to transact business with him as vice-consul and after the expiration of the leave received accounts in his name and approved the accounts, which were paid, could not maintain a claim for a part unpaid, or be regarded as a vice-consul, because not confirmed by the Senate (*Dainese* v. *United States, ubi supra*), certainly the act of 1856 expressly forbidding appointments not made in pursuance of the President's regulations, which act defines the duties of the vice-consular office and constitutes it an office in all respects, has not altered the law in favor of such an irregular appointment as Boyd attempted to make. The President and Senate may, it seems, appoint consuls *where* they see fit, and might have appointed Eaton at Bangkok in 1892. So the President may, it seems, employ special agents for extraordinary purposes of international intercourse, and might have so employed Eaton at Bangkok. But if Eaton was to perform the regular duties of minister resident, and especially if he was to exercise the functions of consul, which are fixed by the law of nations and statutes, the consent of the Senate was necessary, for so the Constitution has determined. There should be some way for the public to know whether a man holds an office or not, and the courts should not invent a set of uncommissioned officials about whom no law or regulation gives information to the public, and a salary list for which Congress has made no appropriation.

In our view of the case, Eaton never held the office of vice-consul-general, or any other office, and his claim for salary and fees must be rejected.

If he did, he earned nothing until after the approval of his bond, on April 23, 1893.

If Eaton was not legally in office, his payments into the Treasury were voluntary and were of moneys collected for illegal acts as judge, minister, and notary. Fees for settling estates were official. (Reg. 1888, sec. 508, par. 69.) The item for candles was personal or diplomatic and wholly foreign to consular business. (See R. S., 1738.) If not legally in office, and so entitled to the salary provided for the legal officer, he could not and did not become entitled to any salary or compensation under contract, such contract being prohibited. (R. S., 1760, *et seq.*) Congress has forestalled by every conceivable statute the making of debts of which it knows nothing when laying taxes and making appropriations of the revenue.

LOUIS A. PRADT,
Assistant Attorney-General.
CHARLES W. RUSSELL,
Assistant Attorney.

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APPELLEE'S BRIEF

[redacted]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, *Appellants*,

vs. No. 174.

LEWIS A. EATON, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

Statement of the Case.

Sempronius H. Boyd, the duly appointed and qualified Minister Resident and Consul-General of the United States at Bangkok, Siam, became seriously ill in June, 1892; as he was advised and believed his illness was hopeless. Having obtained a leave of absence with permission to visit the United States, he departed from Bangkok, July 12, 1892, arrived at his home in Missouri, August 27, 1892, and did not return to his post. His health fluctuated until June 22, 1894, when he died. The period of sixty days (his statutory leave with pay), after his arrival at his place of residence, expired October 26, 1892.

(Record, p. 8, Findings I and II, p. 10, Finding V.)

At the time of his illness there was in Siam no vice-consular officer regularly appointed and qualified to assume the official duties. Robert M. Boyd (son of Sem-

pronius H. Boyd) had been appointed Vice Consul-General at Bangkok, Siam, on November 10, 1891, but had not given bond or qualified to assume the duties at the time of the departure of the Minister Rresident and Consul-General from Bangkok. Robert M. Boyd had left Siam for the United States about March 30, 1892, he did not return to Bangkok until February 11, 1893, and he was not recognized by the Siamese Government and authorized to assume the duties of the office until May 18, 1893.

(Record, p. 10, Findings IV and VI.)

On June 13, 1892, Sempronius H. Boyd, the Minister Resident and Consul-General, being physically unable to perform the duties of his office and believing his illness would terminate fataliy, desiring to protect the interests of the United States during his absence and until the arrival from the United States of Robert M. Boyd, called to his aid Lewis A. Eaton (the appellee herein), a citizen of the United States then resident in Bangkok as a missionary, and asked him to take charge of the consulate and its archives. Eaton acceded to the request, accepted the trust, and on said date began the discharge of the duties imposed upon him by Sempronius H. Boyd. Eaton makes no claim for compensation prior to the departure of Boyd on July 12, 1892.

(Record, p. 8, Finding III; p. 10, Finding VII; p. 12, Finding XIII, and p. 13.)

On June 21, 1892, Boyd officially notified the Minister for Foreign Affairs of Siam, of his illness, and contemplated departure from Siam, and that he had designated Eaton as Vice Consul-General to act during his absence. In this notification, Boyd said:

"All the physicians advise me to go soon to a cold climate. The President has wired me to that effect. In

20 or 30 days, I may be strong enough for a sea voyage, of which I will avail myself. I am authorized to designate and do designate L. A. Eaton, Vice Consul-General until I am able to assume. If not imcompatible with public affairs, I beg you to so regard him."

The letter of Boyd is set out in full on page 9, of the Record. Finding III.

(Record, p. 9, Finding III.)

On June 23, 1892, Eaton took and subscribed to the oath of office, which is set out in full on page 9, of the Record, Finding III, and on the same day Boyd, certified thereon, under his hand and seal, writing as "Minister Resident and Consul-General;" that he had that day appointed Eaton acting consul-general.

(Record, p. 9, Finding III.)

Boyd, upon his departure from Bangkok on (July 12, 1892), transferred the charge of the legation and consulate-general to Eaton, who, on July 13, 1892, informed the Department of State that he (Eaton), had assumed charge of the legation and consulate-general.

(Record, p. 10, Findings VI, VII, and p. 13.)

A form of official bond was thereupon sent to Eaton by the Department of State, in which he was designated as "Acting Consul-General;" this bond was promptly executed by Eaton in accordance with instructions, and was received at the Department of State and approved by the Secretary of State, January 3, 1893, subsequently, under instructions from that department, dated January 24, 1893, another official bond was executed by Eaton, as "Vice Consul-General of the United States at Bangkok," which was approved by the Secretary of State on April 23, 1893. Both of these bonds bore date June 13, 1892, with the knowledge and consent of Eaton's sureties

thereon, and were so dated because of a pencil memorandum on each bond when received in blank by Eaton from the Department of State, directing him to insert the date of his appointment in the blank space reserved for the date.

(Record, pp. 10, 11, Finding VIII, and p. 15.)

From July 12, 1892, to and including May 17, 1893, Eaton was in sole charge of the interests of the Government at Bangkok, and as Vice Consul-General in charge of the office, in the absence of the principal officer, he performed whatever duties were required at the post, with the knowledge of the Department of State and with that Department's approval. That Department acknowledged his communications, and acted upon them as communications from a person authorized to perform the duties of Minister Resident and Consul-General in the emergency then existing. Boyd, upon his departure from Bangkok, transferred the charge of the legation and consulate-general to Eaton. Robert M. Boyd, who had been appointed Vice Consul-General, at Bangkok, on November 10, 1891, had not at the date of the departure of Sempronius H. Boyd from Siam given bond or qualified to assume the duties; he was not then in Siam, having left that country for the United States, about March 30, 1892. The Department of State regarded the temporary appointment of Eaton, as required by the emergency.

(Record p. 10, Findings IV, VI, VII.)

Eaton rendered to the accounting officers of the Treasury, his account as Vice Consul-General at Bangkok, for the entire period of his service, in which he charged and claimed one-half of the salary of $5,000, per annum appropriated for said post of Minister Resident and Consul-General, from July 12, 1892 to October 26, 1892;

that is, from the departure of the Minister Resident and Consul-General to and including the date on which his statutory leave of absence for sixty days (excluding transit time) expired, and the full salary at the rate of $5,000 per annum, from October 27, 1892 to May 17, 1893, inclusive.

(Record p. 11, Finding IX.)

Eaton also rendered with his salary account a return of all fees collected and received by him during the entire period of his service, both fees official and unofficial, including fees notarial and fees and fines received in the United States Consular Court, at Bangkok, amounting in all to $245.11. The notarial and unofficial fees and consular court fees and fines included in said sum amounted to $177.41.

(Record p. 11, Finding X. Record pp. 6, 7, Exhibit C.)

During the period he was in charge, Eaton did not assume to act as interpreter or prisoner keeper; he did not claim or receive pay as such; his sole claim for his services was for salary as Vice Consul-General.

(Record p. 11, Finding X.)

Eaton's account was approved by the Department of State and settled by the accounting officers of the Treasury. He was charged with the total amount of fees received by him as aforesaid, to wit, $245.41, and said sum was covered into the Treasury. The one-half salary from July 12, 1892 to October 26, 1892, amounting to $726.90, was suspended for "further information", which was thereafter furnished; but this sum remains unpaid. The full salary from October 27, 1892 to May 17, 1893, amounting to $2,792.35, was allowed and credited, deducting from which, the sum of $245.41 (total

fees charged), leaves in Eaton's favor a balance of $2,546.94, which was certified to his credit by the First Comptroller, December 4, 1893, no part of which has been paid.

(Record p. 11, Finding XI.)

Eaton also rendered to the Department of State his account of disbursements of the contingent fund of the legation and consulate-general, from July 1, 1892 to April 30, 1893, which was approved by said Department. In the settlement of said account by the accounting officers of the Treasury, the sum of $5.73, expended for candles and lanterns, was suspended for information, which was thereafter furnished, but said sum remains disallowed and unpaid.

(Record pp. 11, 12, Finding XII.)

On June 16, 1894, Sempronius H. Boyd filed his petition (No. 18,527) in the Court of Claims, claiming full salary as Minister Resident and Consul-General to Bangkok, at the rate of $5,000 per annum, from July 1, 1892, to February 11, 1893. After his death, his administratrix, Margaret M. Boyd, was made party plaintiff in said suit.

(Record p. 7 and p. 8, Finding II.)

In the settlement of the accounts of Sempronius H. Boyd, the accounting officers allowed and paid him the full salary of the post, at the rate of $5,000 per annum, to and including July 11. 1892, and one-half salary after his departure from Siam, (July 12, 1892) to and including October 26, 1892, when his sixty days leave with pay (excluding time of transit to his home from Siam) expired. The Court of Claims dismissed the petition of Boyd's administratrix, and no appeal has been taken by her.

(Record pp. 15, 17.)

December 5, 1894, Lewis A. Eaton (the appellee) filed his petition in the Court of Claims, in which he made claim for the following items:

For one-half the salary of the post at Bangkok (at the rate of $5,000 per annum), from July 12, 1892, to October 26, 1892, which was suspended by the accounting officers per Report No. 162,708, for "further information," but not thereafter paid, although the information was furnished.	$726.90
For the balance found due and certified in favor of the claimant, by the First Comptroller, December 4, 1893, per Report No. 162,708, no part of which has been paid.	2,546.94
For the notarial and unofficial fees ($114.41) and consular court fees and fines (63.00), erroneously included as official consular fees, and charged to the claimant per Report No. 162,708.	177.41
For the item of disbursement for contingent expenses, suspended per Report No. 162,709, for explanations, and not thereafter paid, although the explanations were furnished.	5.73
Total amount claimed, . .	$3,456.98

(Record, pp. 1 to 4, pp. 11, 12, Findings XI, XIII.)

For the above sum of $3,456.98, the Court of Claims rendered judgment in favor of Lewis A. Eaton (the appellee herein.)

(Record, p. 17.)

BRIEF OF ARGUMENT.

I. Eaton's Appointment.

Consular officers of the United States are defined as follows, in Section 1674, Revised Statutes:

"First. 'Consul-general,' 'consul' and 'commercial agent,' shall be deemed to denote full, principal, and permanent consular officers, as distinguished from subordinates and substitutes."

Vice-consular officers are thus defined in said section:

"Third. 'Vice-consuls' and 'vice-commercial agents' shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls-general, consuls, or commercial agents, when they shall be temporarily absent or relieved from duty."

The title of "vice consul-general," is authorized in Section 4130, Revised Statutes, as amended by the Act of February 1, 1876. Supplement to Revised Statutes, Vol. 1, second edition, page 97.

Sec. 1695, Revised Statutes, (taken from the Act of August 18, 1856), is as follows:

"The President is authorized to define the extent of country to be embraced within any consulate or commercial agency, and to provide for the appointment of vice-consuls, vice-commercial agents, deputy consuls, and consular agents, therein, in such manner and under such regulations as he may deem proper; but no compensation shall be allowed for the services of any such vice-consul or vice-commercial agent, beyond nor except out of the allowance made by law for the principal consular officer in whose place such appointment shall be made. No vice-consul, vice-commercial agent, deputy consul, or consular agent, shall be appointed otherwise than under such regulations as have been or may be prescribed by the President."

The authority of a citizen of the United States, in case of any sudden emergency requiring the services of a vice-consular officer, to act in such capacity and perform the duties of the principal officer, subject to the subsequent sanction or confirmation of his appointment as vice-consular officer by the Department of State, was well settled and recognized prior to the Act of August 18, 1856, (2 Opp. Atty. Gen., 521 ; 7 Opp. Atty. Gen., 714), and subsequent to that act (Consular Regulations, 1856, Sec. 41 ; Consular Regulations, 1863, Sec. 285 ; Consular Regulations, 1868, Sec. 307).

Section 6, Act June 11, 1874 (18 Stat., 66), provides, "That any vice-consul who may be temporarily acting as consul during the absence of such consul may receive compensation, notwithstanding that he is not a citizen of the United States."

(Supplement to Revised Stats., Vol. 1, 2d Edition, p. 14.)

The Consular Regulations of 1888, prescribed by the President pursuant to law (Section 1695, 1745, 1752, R. S.), were in force during the period covered by the claim of the appellee. Section 36 of said Regulations prescribes the usual method of appointing vice-consular officers, by the Secretary of State upon the nomination previously made by the principal consular officer. Obviously the appointment of Eaton as Vice Consual-General could not have been in strict conformity with this section. As stated by the Court of Claims (Record p. 13), Boyd, the Minister, acted under the spur of necessity, as he was forced to suddenly leave his post. The temporary appointment of a vice consul-general had to be made, if made at all, without delay.

Boyd, in appointing Eaton as vice consul-general, acted in the capacity of diplomatic representative, and complied

with the requirements of Section 87 of the Consular Regulations of 1888, relating to the temporary appointments of vice-consular officers required by an emergency, which is as follows:

"In case a vacancy occurs in the offices, both of Consul and Vice-Consul, which requires the appointment of a person to perform temporarily the duties of the Consulate, the Diplomatic Representative has authority to make such appointment, with the consent of the foreign government and in conformity to law and these regulations, immediate notice being given to the Department of State. In those countries, however, where there are Consuls-General, to whom the nominations of subordinate officers are required to be submitted for approval, the authority to make such temporary appointments is lodged with them. Immediate notice should be given to the Diplomatic Representative of the proposed appointment, and, if it can be done within a reasonable time, he should be consulted before the appointment is made. If such a vacancy should occur in a Consulate-General, the temporary appointment will be made by the Diplomatic Representative."

Under a reasonable construction of this section of the Consular Regulations, the conditions existed which authorized the temporary appointment of Eaton as Vice Consul-General, by Boyd as the Diplomatic Representative. The law provides no Secretary of Legation for the post at Bangkok.

(Record p. 13.)

At posts where the dual office of Minister Resident and Consul-General is provided for by law, there is no officer provided except a Vice Consul-General, to act and perform the official duties in the absence of the principal officer, or where there is an actual vacancy in the office, by reason of the death, resignation or removal from office of the principal officer.

Section 87, of Consular Regulations of 1888, must be construed so as to give effect and carry out the manifest purpose and intention for which the section was framed and prescribed. It would be unreasonable, nay absurd, to assume that it was intended to except and exclude from the provisions of this section, the authority of appointing a temporary Vice Consul-General by the diplomatic representative, at all posts where the principal officer holds the dual position of Minister Resident and Consul-General. Yet, if the contention be correct, that this section must be construed so literally and narrowly, as to authorize the temporary appointment of a Vice Consul-General only where there is an absolute and actual vacancy in the offices both of Consul-General and Vice-Consul-General,—where there is no incumbent or appointee of either of said offices,—then under no circumstances could a temporary appointment of a Vice Consul-General be made by the diplomatic representative, at posts where the dual office of Minister Resident and Consul-General is provided for by law, for at such posts the Consul-General is also the diplomatic representative, and there being no incumbent or appointee of such office, no temporary appointment could be made.

If there must be an actual and absolute vacancy both in the offices of Consul-General and Vice Consul-General, or in the offices of Consul and Vice-Consul, to warrant a temporary appointment of a vice-consular officer, under Section 87 of the Consular Regulations of 1888; then, in no case where the principal officer is absent from his post, but still holding the office, could a temporary appointment of a vice-consular officer be made. The Consul-General at London or Shanghai might be absent from his post on leave, in the United States, and the vice-consular officer regularly appointed in accordance with Section 36 of the Consular Regulations of 1888, might die

or leave his post, yet the Minister would be powerless to make a temporary appointment. The policy of our Government and the purpose of the law and the regulations made pursuant thereto, is to preserve the continuity of the office at all foreign posts by providing for some incumbent, in all cases of emergency, to assume and discharge the official duties necessary to be performed. Otherwise, there being no officer authorized to act, grave emergencies might arise which would work injury to the Government and its citizens. It is obvious from the well-known and long established practice and usage of the Department of State respecting the temporary appointment of vice-consular officers, under an emergency, that no such literal and restricted meaning was intended to be given to Section 87 of the Consular Regulations of 1888. The plain intention and purpose for which this section was framed and intended, is to authorize the temporary appointment of a vice-consular officer to assume and discharge the duties of the post, when there is no consular officer or vice-consular officer present to perform the same. Mr. Boyd, in notifying the Minister for Foreign Affairs of Siam, of his illness and contemplated departure, and of the designation of Eaton as "Vice Consular-General" to perform the official duties during his absence, was particular to state he was "*authorized*" to make such appointment.

(Record, p. 9, Finding III.)

Section 87 of the Consular Regulations of 1888, must be construed in accordance with the general rules of statutory construction.

"It is a sound principal," say the Court of Appeals of New York, "that such a construction ought to be put upon a statute as may best answer the intention which

the makers had in view; and that is sometimes to be collected from the cause or necessity of making it, at other times from other circumstances. Whenever the intention can be discovered it ought to be followed, with reason and discretion in its construction, although such construction may seem contrary to its letter."

Tonnele *v.* Hall, 4 Comstock, 140; Sedgwick on Statutory Construction, 2 Ed., pp. 195–6.

"Words in common use, when found in a statute, are to be taken in their ordinary sense, and technical words in their technical sense, unless as respects either a contrary intent appears; but the real obvious intent is to prevail over any mere literal sense."

Sedgwick, Statutory Construction, 2d Ed., p. 224.

"The causes which led to the enactment of a law are to guide us. If one interpretation would lead to an absurdity, the other not, we must adopt the latter."

(Idem. p. 247.)

"Effects and consequences of a construction are to be considered, and where, from a literal interpretation, an effect would follow contrary to the whole intent and spirit of the statute, the intent and not the literal meaning must be regarded."

(Ryegate *v.* Wardsboro, 30 Vt. 746.)

In Murry *v.* Baker, 3 Wheat. 541; the Supreme Court held the words "beyon seas", in a State statute of limitations, to mean "without the limits of the State."

It is not and cannot be contended that the practice and policy of the Department of State respecting the temporary appointment of vice-consular officers, under an emergency, was in any respect different during the time the Consular Regulations of 1888, were in force, than it was before or since that time. It has been practically the same since the act of 1856. Therefore, Section 107

of the Consular Regulations of 1896, is valuable in showing what was the intention and purpose of Section 87 of the Regulations of 1888.

Section 107 of the Regulations of 1896, provides:

"In case a vacancy occurs in the offices both of consul aud vice-consul, or in case of the absence from the country of both of these officers, or in case of other emergencies, which require the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment with the consent of the foreign government and in conformity to law and these regulations, immediate notice being given to the Department of State." * * * * *

Boyd, in his capacity as diplomatic representative to Siam, notified that government of Eaton's designation as vice consul-general, and asked that he be so regarded, (which consent was granted by that government); and the Department of State was duly notified of Eaton's temporary appointment, immediately after Boyd's departure from Bangkok.

(Record p. 13.)

This temporary appointment of Eaton was sanctioned, approved and ratified by the Department of State. The Assistant Secretary of State said; "the temporary appointment of Mr. Eaton was therefore required by the emergency"; and, in relation to his official dispatches to that Department; "they were duly acknowledged by the Department as communications from a person authorized to perform the duties of minister resident and consul-general in the emergency then existing."

(Record p. 13, also Finding VI, p. 10.)

"The Secretary of State is authorized by law to prescribe the duties of the Assistant Secretaries." (Act June

20, 1874, 18 Stats., at p. 90.) In many of the duties of his Department, he necessarily acts through his assistants, and such action is lawful.

Wilcox *v.* Jackson, 13 Peters, 498; Williams *v.* United States, 1 Howard, 290; see also United States *v.* McDaniel, 7 Peters, 1.

"The vice-consul is in law appointed by the Secretary of State or the President, just as Inspectors of Customs are *in law* appointed by the Secretary of the Treasury (or the President.") * * *

"Whether nominated in the first instance by the Commissioner or by the Consul, the Vice-Consul, when approved by the Secretary of State, is to be deemed a 'person (in)vested by the United States with, and exercising, the consular authority.'"

(7 opp., Att'y-Gen'l., at p. 512.)

The official acts of the Department of State were a ratification of Eaton's temporary appointment and of his authority to perform the official duties at Bangkok in the absence of the principal officer. He was required by the Department of State to execute official bonds, prepared in that Department, the first reciting his appointment as "Acting Consul-General," the second, reciting his appointment as "Vice Consul-General;" both bonds were approved by the Secretary of State.

Eaton's official communications to the Department of State were received and acted upon as communications from a person authorized to perform the duties of the office which Eaton temporarily filled; he was instructed by that Department to perform important official duties.

(Record, p. 10, Finding IV.)

"A subsequent ratification is equivalent to a prior authority."

(Herman's Law of Estoppel, p. 471, Sec. 481; Fleckner *v.* Bank of the United States, 8 Wheaton, 338.

The term "Acting Consul-General," as used in the first bond, and in the certificate as to Eaton's appointment made by Boyd, as Minister Resident and Consul-General, upon the oath of office subscribed by Eaton (Record, p. 9, Finding III), was merely a designation employed in the ordinary sense, without regard to the strict, legal title found in the statute, to denote that the vice-consular officer was acting in the place and stead of the principal officer, just as an Assistant Secretary of an Executive Department of the United States, writes his official title as Acting Secretary, when performing the duties of the head of the department, during his absence or inability to act, although the title "Acting Secretary" is not found in the statute.

This will appear by reference to Section 88, of the Consular Regulations of 1888, and Section 108 of the Regulations of 1896.

The appointment of Robert M. Boyd, as vice-consul-general, on November 10, 1891, did not conflict with the temporary appointment of Eaton. At the time the Minister Resident and Consul-General (Sempronius H, Boyd) left Siam (July 12, 1892), Robert M. Boyd had not given bond as vice-consul-general or qualified to assume the duties; he had left Bangkok on March 30, 1892, and was in the United States at the time Sempronius H. Boyd departed from his post. Robert M. Boyd was not qualified to assume the duties as vice-consul-general at any time during the period covered by Eaton's claim. As stated in the opinion of the Court of Claims (Record p. 13), the appointment of Robert M. Boyd has no bearing upon Eaton's case. Vice-consular officers have "no functions

or powers when the principal officer is present at his post." (Section 19, Consular Regulations, 1888.) No salary or compensation is provided for them as such, and they receive pay only when acting in the absence or in place of the principal officer, and from the allowance made by law for the principal officer. (Revised Statutes U. S., Sections 1695, 1703). There is no inhibition either in the law or in the Consular Regulations, against the appointment of a temporary vice-consular officer while there is one regularly appointed, but who cannot assume and perform the official duties at the time of an emergency requiring such performance; on the contrary, such temporary appointment is expressly authorized in the Regulations, and is sanctioned by usuage of very long standing, which is entitled to the highest consideration.

(United States *v.* Moore, 95 U. S., 763, and authorities therein cited.)

It is contended in the brief of appellants that vice-consular officers cannot be constitutionally appointed, except by the President with the advice and consent of the Senate. It seems to have been the practice in the early history of the Government to appoint vice-consular officers by nomination to the Senate. (7 Opp. Att'y-Gen., 247.) Certainly all consular officers acting temporarily and performing the duties similar to those assigned to vice-consular officers by the Consular Service of Act of August 18, 1856, were not so appointed, (2 Opp. Att'y-Gen., 521; 7 Opp. Att'y-Gen., 714). In tracing the history of the consular service of the United States, prior to the Act of 1856, the Court of Claims, in Dainese *v.* United States (15 C. Cls. R.. 64), said:

"The Act of 1856 (11 Stat. L., 52) first brought order out of this chaotic, crude, and to some extent contradictory legislature; separated the consular service into dis-

tinct grades; defined the powers, duties and compensation of each; and provided a mode for the appointment of each. It is therefore quite clear that Congress, prior to 1856, did not attach definite id[illegible] and significations to the terms which it used in order to describe grades in the consular service."

Referring to the writings of Mr. Jefferson in 1790, the court said:

"It thus appears that at that time consuls and vice-consuls were regarded as independent officers."

Section 31 of the Consular Service Act of August 18, 1856 (now Section 1674, R. S.), declares that "'vice-consuls' and 'vice-commercial agents' shall be deemed and taken to denote 'consular officers,' who shall be substituted temporarily, to fill the places of 'consuls-general,' 'consuls,' or commercial agents,' when they shall be temporarily absent or relieved from duty;" and Section 14 of the same act (now Section 1695, R. S.) authorizes the President "to provide for the appointment" of vice-consuls and vice-commercial agents, "in such manner and under such regulations as he shall deem proper," and further provides that no vice-consul or vice-commercial agent "shall be appointed otherwise than in such manner and under such regulations as the President shall prescribe, pursuant to the provisions of this act."

It is manifest that this act cannot be construed to mean that the "manner" and "regulations," which the President is authorized to "prescribe" for the appointment of vice-consular officers, must be a nomination to and confirmation by the Senate. If Congress had intended such meaning, it could have been expressed in few and simple words. It therefore logically follows that if vice-consular officers cannot be constitutionally appointed except by the President with the advice and consent of the Senate, Section 14 of the Act of August 18, 1856 (R. S. Sec. 1695), is repugnant to the constitution, and therefore null and

void. (Vanhorne *v.* Dorrance. 2 Dall., 304; Marbury *v.* Madison, 1 Cranch., 137.) And if this section of the Act of 1856, be unconstitutional, then the whole of said act stands on doubtful constitutional grounds. If an unconstitutional clause in a statute cannot be rejected without affecting the intent of the legislature, the whole statute must fall.

Spraigue *v.* Thompson, 118 U. S., 90.

Since the Consular Service Act of 1856, the "manner" and "regulations" of appointing vice-consular officers, have been provided in the Consular Regulations prescribed by the President pursuant to law (Sections 1695, 1745, 1752 R. S.); such Regulation have the force of law (Gratiot *v.* United States, 4 Howard, 80; United States *v.* Symonds, 120 U. S., 46). Since the act of 1856, no vice-consular officers have been appointed by the President with the advice and consent of the Senate. Can it be seriously contended that every President and every Secretary of State since 1856, has been guilty of a violation of the Constitution in the matter of the appointment of vice-consular officers, that all such appointments since 1856 have been illegal, and hence the officials acts of vice-consular officers of the United States since 1856, have been without warrant of law? These officers are merely *substitutes* for the principals when absent (Sec. 1674 R. S.); no salary is provided for vice-consular officers, and they are paid only from the salary provided by law for the principals (Sections 1695, 1703, R. S.); they have "no functions or powers when the principal officer is present at his post." (Section 19, Consular Regulations, 1888.)

In the case of Dainese (15 C. Cls. R., 64), which was a claim for services as vice-consul prior to 1856, it was urged by counsel for defendants that prior to the consular service act of 1856, Congress had enacted no statute vesting the

appointment of "inferior consular officers" in the President alone, and that at the time of the alleged service of Dainese (prior to 1856), a nomination to the Senate and confirmation by that body was necessary to entitle a person to hold the office of Vice-Consul of the United States.

The court, as one of the reasons for rejecting the claim of Dainese for services, stated its opinion that the early practice of appointing vice-consular officers by nomination to the Senate, was in harmony with the Constitution, and "in the absence of law authorizing a departure from that practice, it should be followed"; the claimant, having been appointed vice-consul without the approval of the Senate, could not recover any salary for judicial services alleged to have been imposed upon him as vice-consul, even if granted by the Act of 1848. Clearly this opinion recognizes the authority to appoint vice-consular officers without the approval of the Senate, under the Consular Service Act of 1856.

The court further held, as more weighty reasons for rejecting the claim, that Congress did not regard the Act of 1848, as endowing Turkish consulates with a judicial salary, and that the fact that Dainese had furnished no bond either as consul or vice-consul, as required by law, was fatal to his case. Nothing can be found in the Dainese case to support the contention that the Act of 1856, does not constitutionally authorize the appointment of vice-consular officers "in such manner and under such regulations" as the President "shall deem proper."

Commercial agents, who with Consuls-general and consuls are defined by law (Sec. 1674 R. S.) "as full, principal and permanent consular officers, as distinguished from subordinates and substitutes", are by long established usage, appointed by the President alone.

(Consular Regulations, 1888, Section 18, p. 7; Regulations of 1896, Section 15, p. 6.)

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

(Wilcox *v.* Jackson, 13 Peters, 489.)

"The President's duty in general, requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the constitution and laws, required and expected to perform."

(Williams *v.* The United States, 1 Howard, 290.)

It cannot be safely asserted that the President must in person appoint, or approve the appointment, of every vice-consular officer (an officer expressly defined by the statute as "substituted, temporarily, to fill the place" of the principal, when such principal is "temporarily absent or relieved from duty,") in order to make such appointment or approval lawful. In this view of the case, the certificate of appointment issued to a vice-consular officer by the Department of State, and the approval and ratification by that Department of the appointment of a vice-consular officer placed temporarily in charge, under an emergency, may be regarded as the acts of the President. In United States *v.* Hartwell, 6 Wallace, 385—this Court held that a clerk in the office of the Assistant Treasurer of the United States at Boston, appointed by the Assistant Treasurer with the approbation of the Secretary of the Treasury, "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power." This case related to a criminal indictment, hence the strictest construction of the statute was adhered to.

II. Eaton's Title to Compensation from the Salary Appropriated by Law for the Post at Bangkok.

The claim of the appellee is for compensation for his services in the capacity of vice consul-general and for services rendered in that capacity. His account was so rendered to the accounting officers of the Treasury and settled by them on that basis. His suit in the Court of Claims was for the compensation allowed him by law as vice consul-general, subject to the provisions of the Consular Regulations. It is not denied that Eaton performed consular services and collected consular fees which were charged to him in the settlement of his accounts. It is not shown that he assumed or performed "diplomatic functions," nor is it material to inquire, since he has made no claim for such services. The Court of Claims, in Finding VII, Record, p. 10, say:

"From July 12, 1892, to and including May 17, 1893, he was in sole charge of the interests of the Government at Bangkok, and performed whatever duties were required there of either a minister-resident or a consul-general, with the knowledge of the Department of State and with that Department's approval."

It is suggested in the brief of appellants that the performance of this duty by Eaton and the approval of it by the Department of State were violations of Section 1738, Revised Statutes.

Said Section of the Revised Statutes, prohibits the exercise of "diplomatic functions" by a consular officer of the United States, when there is in the country to which he is appointed, any officer of the United States authorized to perform diplomatic functions therein, but, otherwise, allows the performance of such duties by a consular officer when authorized by the President. After Sem-

pronius H. Boyd, the Minister Resident and Consul General to Siam, had left Bangkok, there was no other diplomatic officer of the United States in Siam authorized to perform diplomatic functions, during the period Eaton was in charge of the legation and consulate-general. It cannot be assumed, in the absence of any proof, that the Secretary of State (or the Assistant Secretary) violated the law, in approving the duties which were performed by Eaton, or that Eaton violated the law in the performance of such duties.

In United States *v.* Peralta (19 Howard, 343), the Supreme Court said:

"We have frequently decided that 'the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.'"

The courts ought to require very full proof that an officer has transcended his powers, before they so determine it.

Srother *v.* Lucas, 12 Peters, 410.

Prior to the consular service act of 1856, it was well settled that a vice-consular officer, acting during the absence of his superior, or during a vacancy in the office, shall be compensated out of the salary appropriated by law for the principal officer.

In the case of Charles J. Coxe, who, without any regular appointment remained in charge of the office and performed the duties upon the death of his father, who was U. S. Consul to the Barbary States, and died while in office, Attorney-General Taney, in 1832, advised the President, as follows:

"The salary claimed by Charles J. Coxe, during the time he acted as Consul, may I think, be legally paid him as salary. The law of May 1, 1810, gives the salary to

the Consul for his personal service and expenses. If, after the death of Mr. Coxe, his son performed the services and incurred the expenses of a residence there, and his acts have been recognized by the Government, I do not perceive why he should not receive the compensation fixed by law for such services. He was *de facto* Consul for the time, and the public received the benefit. What services he performed, or had to perform, I have not the means of knowing, and the opinion I expresss is founded on the presumption that he rendered faithfully whatever services a Consul duly appointed would have rendered for the time, and that the Government have adopted his acts in that character. The practice of the Government sanctions this opinion, as appears by the papers before me, and in several instances similar to this since the law of 1810, the salary has been paid. I refer to the case of Mr. Folsom, in 1818 and 1819; Mr. Heap, in 1823 and 1824; Mr. Simpson, in 1820 and 1821; and Mr. Hodgson, in 1819.

"The public interest requires that the duties of the office should be discharged by some one, and where, upon the death of the consul, a person who is in possession of the papers of the consulate, enters on the discharge of its duties and fulfils them to the satisfaction of the Government, I do not perceive why he should not be recognized as consul for the time he acted as such, and performed the services to the public, and if he is so recognized, the law of Congress entitles him to his salary."

(2 Opp. A. G., 521.)

The opinion of Attorney-General Taney in this case, touching the right to compensation of a person acting without any regular appointment, and performing the duties of the principal officer in a foreign country, is in line with the decision of the Court of Claims in Savage's case (1 C. Cls., R. 170), made at a later date, (1865) in which the court held that:

"A party acting and treated by the United States as their *charge* in a foreign country during the absence of their minister, may recover the value of his services &c., although he received no specific appointment."

In 1856, Mr. Marcy, Secretary of State, in a letter bearing the date of June 3d, propounded the following questions to the Attorney-General, respecting the compensation of vice-consuls:

1. "When a consul is absent from his post, is the person whom the consul, with the sanction of the department, has left in charge of the consulate, and performing the duties, entilted to the statute salary?"

2. "If a consulate becomes vacant by death, resignation or the removal of the incumbent, is the individual who shall have been placed by a minister or other authorized agent of the Government in charge of the office, entitled to the salary?"

Attorney-General Cushing, in answer to Mr. Marcy's inquiries, held, "that the substitute consul or *locum tenens*, is to be paid out of the salary or to go uncompensated."

Mr. Cushing's answers to the questions propounded, are stated as follows:

1. "A substitute or vice-consul, left in charge of the consulate during the temporary absence of the consul, is to be compensated out of the statute emoluments of the office, subject to the regulations of the Department."

2. "An acting consul, in charge of a consulate during actual vacancy of the consulate, is entitled to receive the statute compensation of the office."

(7 Opp. A. G., 714.)

Mr. Wharton, in his Digest of International Law (Vol. I. Sec. 118, p. 772), prepared while he was Solicitor of the Department of State, in 1886, adopts the foregoing answers of Mr. Cushing, as the proper construction of the law governing the compensation of vice-consular officers of the United States.

Section 1695, Revised Statutes (taken from Section 14,

Consular Act of August 18, 1856), and hereinbefore cited, provides that no compensation shall be allowed for the services of a vice-consular officer "beyond nor except out of the allowance made by law for the principal consular officer," in whose place such vice-consular officer may temporarily act.

Section 1703, R. S. (taken from Sec. 15 of said Act), is as follows:

"Every vice-consul and vice-commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer."

Section 471, (clauses 1 and 2, pp. 167, 168) of the Consular Regulations of 1888, (which were in force during the time Eaton was in charge at Bankok), determines the compensation to be paid to vice-consular officers, as follows:

1. "In case the principal officer is absent on leave for sixty days or less, in any one calendar year, and does not visit the United States, the vice-consular officer acting in his place is entitled to one-half of the compensation of the office from the date of assuming its duties unless, there is an agreement for a different rate, the principal officer receiving the remainder. But after the expiration of the sixty days, or after the expiration of the principal's leave of absence (if less than sixty days), the vice-consular officer is entitled to the full compensation of the office."

2. "If the principal visits the United States on such leave and returnes to his post, the foregoing rule will include the time of transit both from and to his post, as explained in paragraph 460. But if the principal does not return to his post, either because of resignation or otherwise, the

rule will embrace only the time of absence, not exceeding sixty days, together with the time of transit from his post to his residence in the United States."

The provision in the foregoing section of the Consular Regulations limiting the pay of the principal officer, when absent from his post, to sixty days, with time of transit going to and returning from the United States, added, is based on Section 1742 of the Revised Statutes U. S., which is as follows :

"No diplomatic or consular officer shall receive salary for the time during which he may be absent from his post, by leave or otherwise, beyond the term of sixty days in any one year; but the time equal to that usually occupied in going to and from the United States in the case of the return, on leave, of such diplomatic or consular officer to the United States may be allowed in addition to such sixty days."

The compensation of a vice-consular officer, who fills the place of the principal, continues during the entire time he acts in the absence of the principal and performs the duties, even if in excess of the statutory leave of the principal, nothwithing the salary of the principal ceases by operation of law after the expiration of his absence for sixty days (excluding transit time).

12 opp. Atty. Genl. 410.

The foregoing provisions of the law and Consular Regulations govern and regulate the salary of Boyd (the minister-resident and consul-general) after his departure from his post (July 12 1892), and the compensation of Eaton as vice-cousul-general, from that date to May 17, 1893, when Eaton was relieved.

The compensation of a vice-consular-officer at posts where the principal holds the combined office of minister

resident and consul-general, is governed by the Consular Regulations, and differs in no respect from that of vice-consular officers at posts where the principal is a consul-general or a consul.

The "Personal Instructions to Diplomatic Officers of the United States", issued by the Secretary of State, require officers who hold the combined or dual office of Minister Resident and Consul-General, to follow the Consular Regulations in the matter of their official accounts.

Section 35, page 11, of the "Personal Instructions to Diplomatic Officers," of 1885, which were in force during the period of Eaton's claim, is as follows:

"When the office of Consul-General is added to that of Minister Resident, Charge d'Affaires, or Secretary of Legation, the diplomatic rank is regarded as superior to the consular rank The officer, however, will follow the Consular Regulations in regard to his consular duties and official accounts, keeping correspondence in one capacity separate from correspondence in the other."

The accounts of both Boyd and Eaton were settled by the accounting officers of the Treasury in accordance with the foregoing provisions of the law and Consular Regulations, as shown in the Findings of the Court of Claims, IX, X and XI, (Record p. 11).

Boyd was allowed the full salary of the post up to the date of his departure therefrom (July 12, 1892), and the one-half salary from July 12, 1892 to and including October 26, 1892, the date on which his statutory leave of absence for sixty days (after his arrival at his home in Missouri) expired. (Record p. 15.) After the expiration of said sixty days Boyd's salary was absolutely stopped by the provisions of Section 1742 Revised Statutes.

There being no agreement between Boyd and Eaton as to the compensation of the latter, Eaton is entitled under

the law and Consular Regulations (Section 471, clause 1, p. 167), to one-half of the salary of the post from the date of Boyd's departure to the expiration of his statutoy leave of sixty days, to wit: from July 12 to October 26, 1892, and to the full salary from October 27, 1892 to May 17, 1893. The accounting officers suspended the one-half salary due Eaton from July 12, 1892 to October 26, 1892, (amounting to $726.90), "for further information," it being alleged that there was an agreement between Boyd and Eaton by which Eaton was to receive the pay of interpreter and prison-keeper to the post at Bangkok.

(Record p. 15.)

Eaton received no pay either as interpreter or prison-keeper, nor did he act or assume to act in either capacity. He furnished to the accounting officers the information asked for, but the one-half salary from July 12, 1892 to October 26, 1892, has not been allowed or paid.

(Record, p. 11, Findings X, XI.)

Eaton was allowed and credited by the accounting officers, with the full salary of the post from October 27, 1892 to May 17, 1893, and charged with the total amount of fees of all kinds (including unofficial and notarial fees), which left a balance of $2,546.94, due to him, which was certified in his favor by the First Comptroller of the Treasury, on December 4, 1893, but payment of this sum is refused and no part of the same has been paid.

(Record, p. 11, Finding XI.)

These two items of $726.90 and $2,546.94, amounting to $3,273.84, are allowed by the Court of Claims to Eaton, for his compensation as vice-consul general; no part of the same is for compensation in any diplomatic capacity or for diplomatic services.

The comptroller refused to pay these items, pending a decision by the courts, as to the legal right of Eaton to receive any compensation whatever, prior to the date of the approval of his bond, as vice-consul general, by the Secretary of State.

Eaton assumed the duties of the office at Bangkok on July 12, 1892, when Boyd left his post for the United States. His first bond, prepared and sent to him by the Department of State, and executed as "acting consul-general," was approved by the Secretary of State, January 3, 1893; his second bond, also prepared and transmitted by the Department, and executed as "vice-consul-general," was approved by the Secretary of State, April 23, 1893.

(Record pp. 10, 11, Finding VIII.)

This brings us to consider:

III. Eaton's title to Compensation for Services Performed prior to the Execution of his Bond or to the date of the approval thereof.

Under the circumstances attending Eaton's appointment, he gave bond as soon as he could. The forms of the bonds which he executed were prescribed by the Department of State, and both were executed with diligence and in accordance with the directions he received from that department. Manifestly it would have been impossible for Eaton, (or any vice-consular officer appointed under like circumstances), to have executed a bond, transmitted it to the Department of State, and secured the approval of the Secretary of State thereon, prior to the date on which he assumed the duties of his office.

As stated in the opinion of the Court of Claims (Record, p. 15): as Eaton "was designated by Boyd prior (necessarily) to confirmation by the Department of State and

had to await approval from that department—instructions and a form of bond—a period necessarily elapsed between his designation to the office and the approval of his bond by the department. In the nature of things this was unavoidable."

Lex non cogit ad impossibilia.

(Co. Litt., 231 b.) Schroeder *v.* Hudson River R. R. Co., 5 Duer, 55, 62.)

"No text imposing obligations is understood to demand impossibe things."

(Sedgwick on Statutory Construction, 2d Ed., p. 247.)

Clauses 1 and 6 of Section 471, of the Consular Regulations, 1888, pp. 167–169, provide that the compensation of a vice-consular officer shall begin upon the date he assumes the duties of the office of the principal officer, that is upon the departure of his superior officer.

The same provision is contained in Section 506 (clauses 1 and 6) of the Consular Regulations of 1896.

This provision, as to the time when the compensation of a vice-consular officer begins, rests upon the long established custom of the Department of State, acquiesced in and adopted by the accounting officers of the Treasury as a rule of department practice (Record, p. 15). This rule was followed by the accounting officers in the settlement of Eaton's account. This rule of practice, to say nothing of the authority of the Consular Regulations, is entitled to great consideration.

United States *v.* Gillmore, 8 Wallace, 330; United States *v.* Moore, 95 U. S., 760, (at p. 763) and authorities there cited.

Section 1698, Revised Statutes, is as follows:

"Every vice-consul shall, before he enters on the ex-

ecution of his trust, give bond, with such sureties as shall be approved by the Secretary of State, in a sum not less than two thousand dollars nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office according to law, and for truly accounting for all moneys, goods, and effects, which may come into his possession by virtue of his office. The bond shall be lodged in the office of the Secretary of the Treasury."

(See also, Section 39, p. 16, Consular Regulations, 1888.)

As required by Section 47, p. 18, Consular Regulations, 1888, the bond of a vice-consular officer must be executed, approved and filed, before his accounts for compensation can be adjusted at the Treasury or any compensation paid; and such has been the rule of practice of the accounting officers. But where a vice-consular officer has been permitted by the Government to enter upon and discharge the duties of the office, for a period of time prior to the date of his giving bond, or prior to the date of the approval of his bond, and his services have been accepted, and his bond afterwards filed and approved, it has been the long established rule to allow and pay his compensation from the date on which he assumed the duties of the office as provided in Section 471, of the Consular Regulations, (clauses 1 and 6).

The compensation for services rendered and accepted, prior to the date of giving bond or prior to the date of approval of the bond, is not forfeited because the bond was not given within the time prescribed in the statute.

"There is", said Lord Mansfield, in Rex *v.* Loxdale, 1 Burrow, 447, "a known distinction between circumstances which are of the *essence* of the thing required to be done by an Act of Parliament, and clauses *merely directory*. The precise time in many cases is *not* of the *essence*." Following this principle, the courts have, by

great weight of authority, held that statutes requiring that bonds shall be given by public officers within a specified time, although couched in the most explicit language, are directory only.

In United States *v.* Bradley, 10 Peters, 343, one of the questions for decision was, whether a paymaster was entitled or authorized to act as such, who had not given the bond provided by the statute (Act April 24, 1816, Sec. 6, 3 Stats., at Large 298), requiring paymasters to give bond "*previous to their entering on the duties of their respective offices.*"

Story, J., delivering the opinion of the court (at p. 364), said :

"Before concluding this opinion, it may be proper to take notice of another objection raised by the third plea, and pressed at the argument. It is that Hall was not entitled to act as paymaster until he had given the bond required by the Act of 1816, in the form therein prescribed, and that, not having given any such bond, he is not accountable as paymaster for any moneys received by him from the Government. We are of a different opinion. Hall's appointment as paymaster was complete when his appointment was duly made by the President and confirmed by the Senate. The giving of the bond was a mere ministerial act and not a condition precedent to his authority to act as paymaster."

That portion of the decision in United States *v.* Bradley, above cited, was quoted and affirmed in United States *v.* Linn, (15 Peters, at p. 313,): where, Linn, a Receiver of Public Moneys, required by law to give bond "*before entering on the duties of his office*", had given an unsealed instrument, which the court decided was not a bond, but a valid obligation at common law. The Supreme Court held that the emoluments of the office to which Linn had been appointed, "were the consider-

ations allowed him for the execution of the duties of his office, and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment."

Referring to the decision in United States *v.* Bradley, the court said :

"According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure* as well as *de facto* when the instrument in question was given. And although the law requiring security was directory to the officers intrusted with taking such security, Linn was under a legal as well as a moral obligation to give the security required by law, and being entitled to the compensation and emoluments attached to the office, which was for four years from the 12th of January, 1835, this was a sufficient consideration appearing on the face of the instrument to support the promise."

In the City of Chicago *v.* Gage, 95 Ills., 593, where the city charter provided that all officers who were required to give bond for the faithful performance of official duties, should *"file their bonds with the city clerk within fifteen days after their election;"* the Supreme Court of Illinois in an elaborate opinion, reviewing many previous authorities, held these provisions to be directory only—that "a failure to file in time does not, of itself, annul or avoid the right or title to the office, but merely renders it voidable or defeasable. If the officer files his bond strictly in time, his right and title to the office are indefeasable. If he files it afterwards, and it be accepted and approved, his right and title thereupon become equally indefeasable."

To the same effect are :

Speake *v.* United States, 9 Cranch., 28 ;

State *v.* Toomer, 7 Rich, S. C. Law, 216 ;

State *v.* Churchhill, 41 Mo., 41;
Sprowl *v.* Lawrence, 33 Ala., 674;
People *v.* Holley, 7 Wend. (N. Y.), 481;
State *v.* County Court, 44 Mo., 230;
State *v.* Porter, 7 Ind., 294;
State *v.* Falconer, 44 Ala., 696;
State *v.* Colvig, 15 Oreg., 57;
State *v.* Peck, 30 La. Ann., 280;
Kearney *v.* Andrews, 10 N. J. Chancery (Stockton), 70;
State of Maryland *v.* Commissioners of Baltimore County, 29 Md., 516.

As the failure to give the bond within the prescribed time does not of itself work a forfeiture, *a fortiori* is this so, when the failure was through no fault of the officer.

Ross *v.* Williamson, 44 Ga., 501;
State *v.* Hadley, 27 Ind., 496.

The doctrine laid down in the cases cited, does not conflict with the decision in United States *v.* Le Baron, 19 Howard, 73, where one of the questions before the court was, whether the appointment of Oliver S. Beers, as Deputy Postmaster at Mobile, after his confimation by the Senate, was rendered invalid by reason of the subsequent death of the President before the transmission to the appointee of his commission, which had been signed by the President before his death.

In deciding that Beers was duly commissioned under this appointment, the court said (at p. 78):

"When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the ap-

pointee before he shall enter on the possession of the office under his appointment. These acts become conditions precedent to the complete investiture of the office, but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed, and when the person has performed the required conditions, his title to enter on the possession of the office is also complete."

This is entirely in harmony with the doctrine laid down in the decisions previously cited. Where the statute requires the appointee to give bond before entering upon the duties of his office, the giving of such bond is a condition precedent to his "*complete investiture of the office,*" previous to which his title to the office is *voidable or defeasable*, but his failure to give bond within the prescribed time *does not, of itself, annul* or *avoid* his *right* or *title* to the office. In the words of Judge Story, in United States *v.* Bradley (*ante*), "the giving of the bond" is a "*mere ministerial act*, and not a condition *precedent to his authority to act*," in his official capacity and perform the duties of the office.

If the appointee fails altogether to give any bond, where the statute requires it, he never acquires "the complete investiture of the office," and therefore his right to compensation fails.

Dainese *v.* United States, 15 C. Cl. R., 64;
Williams *v.* United States, 23 C. Cl. R., 46.

But where the bond has been given, accepted and approved, although after the time prescribed by the statute, which is merely directory and not of the essence, the defeasable title is made indefeasable and complete,—the party has acquired "complete investiture of the office," which relates back to the beginning of his services; and gives him a perfect right to compensation from that date.

In Williams *v.* United States, (23 C. Cl., R., 46), the claimant, who had been appointed Minister Resident and Consul-General to Hayti, but had not given bond or received his commission, or entered upon the duties of his office, was held not entitled to salary claimed for time occupied in receiving instructions, because he had failed to give any bond.

And in delivering the opinion of the court in that case, the learned Chief Justice clearly recognized the principles already averted to, in these words, (at page 52):

"The question does not arise here, whether such an officer, under some circumstances, and to some extent, might not be held to have been in office and entitled to its salary from the date of his commission or from the date of his taking the oath, if within a reasonable or proper time his bond should be tendered, because the claimant never tendered a bond at any time."

In United States *v.* Flanders, (112 U. S. Reports, 88), the case was directly presented for decision by the Supreme Court, whether a collector of internal revenue who, having been duly appointed by a commission dated March 4, 1863, entered upon the discharge of his official duties as collector on March 11, 1863, but did not take the oath of office or give bond until May 15, 1863, was entitled to any compensation prior to the date of taking the oath and filing his bond.

The provisions of law at that time in force respecting the taking of the oath of office and giving bond are thus stated by the court, in their opinion, rendered November 3, 1884:

"At that time the Act of July 2, 1862, 12 Stat., 502, was in force, which provided that every person appointed to any office of profit under the government, in any civil department of the public service, except the President,

should, 'before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe' an oath or affirmation, the form of which is given. Section 4, of the Act of July 1, 1862, 12 Stat., 433, provided that, before any collector of internal revenue should 'enter upon the duties of his office,' he should give a specified bond with sureties."

Neither the oath was taken nor the bond given until more than two months after the collector had entered upon the discharge of the duties of his office.

The language of the statute then in force respecting the oath of office, (which was carried into Sec. 1756 R. S., and that section repealed by the Act of May 13, 1884, 23 Stat., 22, Sec. 2), is most explicit in its terms, requiring not only that the oath should be taken "*before entering upon the duties*" of the office, but also "*before being entitled to any of the salary or other emoluments thereof.*"

Yet, the court held that the collector was entitled to the compensation provided by the law then in force respecting the compensation of collectors of internal revenue, "from the time when, after receiving his commission, he was permitted by the government to discharge the duties of the office and his services were accepted therein, although, during a portion of such time, he had not taken his official oath nor given his official bond," (at p. 90). The court further said:

"If he is appointed, and acts and collects the moneys and pays them over and accounts for them, and the government accepts his services and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath 'before being entitled to any of the salary or other emoluments, of the office. But, we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or

appropriate, the commissions as compensation, does not arise until he takes, and subscribes the oath or affirmation, but that, when he does so, his compensation is to be computed on moneys collected by him, from the time when under his appointment he began to perform services as collector, which the government accepted, provided he has paid over and accounted for such moneys," (at p. 91).

Clearly, in this case, the court decided upon the question as to the right of an officer to receive compensation for services rendered prior to the date of giving bond and prior to the date of taking the oath of office, (where the oath was taken and the bond filed after he had entered upon his official duties). The fact that the compensation of the collector was "a specified percentage commission, to be computed on the moneys 'paid over and accounted for under the instructions of the Treasury Department'," does not and cannot alter or effect the force of the decision as to the title to compensation prior to the date of giving bond and taking the oath. The method of computing the compensation and ascertaining the amount, in accordance with the statute, could have no logical bearing on the abstract question as to the title to compensation for services performed prior to the date of taking the oath and giving bond.

The statute required that the oath should be taken "*before entering upon the duties*" of the office, and "*before being entitled to any of the salary or other emoluments thereof;*" another statute provided that before any collector of internal revenue should "enter upon the duties of his office," he should give a specified bond with sureties.

The restriction growing out of the statute relating to the oath of office reached not only the salary of the office but other emoluments thereof. The court held that the title to compensation did not arise until the collector had

taken and subscribed the oath, but that after he had done so, his compensation began from the date when he began to perform services as collector. The decision is grounded on the general doctrine already adverted to and accords therewith. It is directly applicable to the title of the appellee to compensation for services performed prior to the date of his giving bond and to the date of the approval thereof, and is decisive of his reght to compensation from the date on which he assumed the duties of the office in the absence of the principal officer.

IV. The Unofficial Fees.

Eaton inadvertently and erroneously included in his return of fees, rendered with his salary account, fees for unofficial and notarial services performed by him, amounting to $114.41, and also fees and fines collected in the Consular Court at Bangkok, and expended for Consular Court expenses, for which Eaton has not been repaid, amounting to $63.00, making in all, $177.41, which sum the accounting officers charged to him along with the official fees, in the settlement of his accounts.

(Record p. 11, Finding X; p. 6, Exhibit C, and p. 16.)

The unofficial and notarial fees amounting to $114.41, being fees for services not required by law or regulations, were properly allowed to Eaton by the Court of Claims, under the decision in United States *v.* Mosby, 133 U. S. 273, in which fees for services of like character were allowed to the appellee (Mosby). This decision has been followed in the Court of Claims in Stahel *v.* United States, 26 C. Cls. R., 193, and in other cases involving claims for fees of like character.

Included in said amount of $114.41, is the sum of $67.91 for commissions charged for the settlement of of private estates of two decedents, at the rate of 5 per cent.

(Record p. 12, Finding XIII; and p. 6, Exhibit C.)

In the Mosby case above cited, (133 U. S. at page 287, item *f* in Finding 12), this court allowed the five per cent commission on the estate of Alice Evans," holding that this was "a fee in the settlement of a private estate, and was properly allowed" by the Court of Claims. The Court of Claims allowed the same fee for settling decedents' estates in the case of Stahel.

(26 C. Cls. R., 193.)

During the period covered by Mosby's claim, the Consular Regulations of 1874 and 1881, were in force, and were considered by the court in deciding that case (United States *v.* Mosby, 133 U. S. pp. 280, 289). By reference to Sec. 333, par. 56, page 80, Consular Regulations 1874, and Sec. 496, par. 69, page 169, Consular Regulations 1881, it will be seen that the five per cent commission for settling estates of decedents is included in the tariff of consular fees. Nevertheless, the court held that this charge was not an official fee, being for the settlement of a private estate. In the Consular Regulations of 1888, Sec. 508, par. 69, page 181, the same five per cent commission for settling decedents' estates, is included in the tariff of consular fees. On this ground it is claimed in the brief of appellants (p. 23) that the fees for settling these private estates were official. It will hardly be seriously contended that mere inclusion of this five per cent commission for settling decedents' estates, in the tariff of fees in the Regulations of 1888, annuls the decision of this court in the Mosby case, and converts the commission into an official fee.

The item of $63.00, for fees and fines in the Consular Court collected by Eaton, were expended for consular court expenses, as provided in Section 4120 Revised Statutes, (Section 1396, p. 472, Consular Regulations, 1888), and for which expenses Eaton has not been repaid.

(Record, p. 16.)

These fees and fines were improperly included in Eaton's return of fees, which embraced fees of all character received by him, including unofficial and notarial fees and consular court fees and fines. This item was erroneously charged by the accounting officers in the settlement of Eaton's accounts, and was properly allowed by the Court of Claims.

V. Item of Contingent Expenses.

The item of $5.63, expended by Eaton for candles and lanterns, was approved by the Department of State as a proper charge in his account of disbursements for contingent expenses. The charge was for official, not personal expenses. The accounting officers suspended the item for explanations, but failed to allow or pay it after the required explanations were furnished. The expenditure was in the discretion of the Department of State (R., p. 16), was approved by that department, and properly allowed by the Court of Claims.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed as to each of the items recovered in that court by the appellee.

JOHN C. CHANEY,
JOHN R. GARRISON,
For Appellee.

No. Sxg. 174.
Motion papers for Appellee
Filed Dec. 14, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, *Appellants,*		No. 519.
v.		APPEAL FROM THE COURT OF CLAIMS.
LEWIS A. EATON, *Appellee.*		

MOTION TO ADVANCE.

Now comes the Appellee, by his attorneys, and moves the court that this case be advanced upon the docket, for trial; for the reason that the decision upon the issues raised therein, involves the possible modification of the Regulations of the Department of State respecting the compensation of Consular Officers of the United States, and will afford a rule for the government of the accounting officers of the Treasury in allowing such compensation.

JOHN C. CHANEY,
JOHN R. GARRISON,
Attorneys for Appellee.

UNITED STATES v. EATON.

APPEAL FROM THE COURT OF CLAIMS.

No. 174. Submitted January 4, 1898. — Decided February 28, 1898.

Congress has power, under the Constitution, to vest in the President authority to appoint a subordinate officer, called a vice-consul, to be temporarily charged with the duty of performing the functions of the consular office.

The Revised Statutes confer upon the President full power, in his discretion, to appoint vice-consuls, and fix their compensation, to be paid out of the allowance made by law for the principal consular officer in whose place such appointment shall be made.

The facts that the minister resident and consul-general at Siam had obtained a leave of absence from the President, and was ill and unable to discharge his duties, and that the vice-consul previously appointed had not qualified, and was absent from Siam, created a temporary vacancy and justified an emergency appointment to fill it.

The accounting officers of the Government did not err in treating the salary fixed by law for the joint service of minister resident and consul-general at Siam as indivisible.

There was no error in allowing Eaton compensation for a period during which he performed the duties of the office before his official bond was received and approved.

A consular officer must account to the Government for fees received by him for administering upon the estates of citizens of the United States, dying within the limits of his jurisdiction.

In October, 1890, Sempronius H. Boyd was commissioned as minister resident and consul-general of the United States to Siam; he qualified and proceeded to his post, and was in June, 1892, engaged in the discharge of his official duties. At that time, being seriously ill, Boyd was granted by the President a leave of absence. Before leaving Bangkok, Siam, Boyd, to quote from the findings of fact, "believing his illness would terminate fatally, and being desirous to protect the interests of the Government during his absence and until the then expected arrival from the United States of Robert M. Boyd, whom Sempronius Boyd desired should act as consul-general, the latter called to his aid Lewis A. Eaton (now a plaintiff herein, who was then a missionary at Bangkok) and asked him

to take charge of the consulate and its archives. Thereupon the following letter, dated June 21, 1892, was written by Boyd:

"U. S. Legation and Consulate-General,
"*Bangkok, June* 21, 1892.

"Krom Luang Devawongsee Varoprokan,
"*Minister for Foreign Affairs:*

"Monsieur le Ministre: It is with exceeding regret to me to be forced to abandon my diplomatic and consular duties at the court of His Majesty, with the enjoyment, pleasure, comfort and genuine friendship so marked and distinguished, which the representative of the United States fully appreciated and imparted to his Government.

"All the physicians advise me to go soon to a cold climate. The President has wired me to that effect. In 20 or 30 days I may be strong enough for a sea voyage, of which I will avail myself. I am authorized to designate and do designate L. A. Eaton vice-consul-general until I am able to assume. If not incompatible with public affairs, I beg you to so regard him.

"Monsieur le Ministre, I am too weak and feeble to call in person, which I would so much like to have done, and expressed my thanks and that of my Government to the foreign office and attachés.

"With assurance of my high consideration, I have the honor to be, Monsieur le Ministre, your obedient servant."

Boyd thereupon administered to Eaton an oath to faithfully discharge the duties of the office of vice-consul-general, etc. The findings state that Boyd believed he had authority for this action. Robert M. Boyd, who is referred to above, was then in the United States, and, although appointed as vice-consul, had not qualified. Sempronius H. Boyd remained in Siam until the 12th day of July, 1892, when he left for the United States, and on his departure he turned over to Eaton, as the representative of the Government of the United States, all the archives and property of the legation. Boyd arrived at his home, in the State of Missouri, on August 27, 1892, and although his leave of absence expired October 26, 1892, he did

not, on account of illness, return to his post, but remained at his home, where he died June 22, 1894. Eaton, on the departure of Boyd, was the sole person "in charge of the interests of the Government at Bangkok, and performed whatever duties were required there of either a minister resident or a consul-general, with the knowledge of the Department of State and with that department's approval. The department acknowledged his communications and acted upon them as communications from a person authorized to perform the duties of minister resident and consul-general in the emergency then existing." On "September 2, 1892, Eaton executed (under instructions from the Department of State) an official bond, calling himself acting consul-general of the United States at Bangkok; this was received at the Department of State and was approved January 3, 1893; subsequently, under instructions from the Department of State, dated January 24, 1893, he executed another bond as vice-consul-general of the United States at Bangkok, which was approved by the Secretary of State April 23, 1893. Both of these bonds bore date June 13, 1892, with the knowledge and co nsent of Eaton's sureties thereon, and were so dated because of a pencil memorandum on each bond when received in blank by Eaton from the Department of State, directing him to insert the date of his appointment in the blank space reserved for the date."

On November 2, 1892, the Secretary of State wrote Eaton, enclosing him the commission of Robert Boyd, which had been issued in 1891, as vice-consul at Siam. In February, 1893, Robert Boyd appeared in Siam, and, in accordance with the instructions of the Secretary of State, Eaton introduced him as vice-consul, and on May 18 he qualified, when Eaton's performance of the duties of the office ceased. The findings below say:

"Eaton rendered to the accounting officers of the Treasury his account for salary for the entire period of his service, in which he charged and claimed one half of the salary of $5000 per annum appropriated for said post of minister resident and consul-general, from July 12, 1892, to October 26, 1892; that is, from the departure of the minister to and including the

date on which the leave of absence for sixty days (excluding transit time) expired, and the full salary at the rate of $5000 per annum from October 27, 1892, to May 17, 1893, inclusive.

"Eaton also rendered with his salary account a return of all fees collected during the entire period of his service, both fees official and unofficial, including fees notarial and fees and fines received in the United States consular court at Bangkok, amounting in all to $245.41.

"Eaton also rendered to the Department of State his account of disbursements from the contingent fund of the legation and consulate-general from July 1, 1892, to April 30, 1893, which was there approved.

"In the settlement of said accounts by the accounting officers of the Treasury the sum of $5.73, expended by Eaton for candles and lanterns, was suspended for information, which was thereafter furnished, but said sum remains disallowed and unpaid.

"In the settlement of Eaton's salary accounts by the Treasury the total amount of fees received, to wit, $245.41, was charged to him and covered into the Treasury. The one half salary from July 12, 1892, to October 26, 1892, amounting to $726.90, was suspended for 'further information,' which was thereafter furnished; but this sum remains unpaid. The full salary from October 27, 1892, to May 17, 1893, amounting to $2792.35, as approved by the Department of State, was allowed and credited. Deducting from this $245 leaves in Eaton's favor a balance of $2546.94, which was certified to his credit by the First Comptroller December 4, 1893, no part of which has been paid."

It is inferable from the facts found that the amount of compensation which the accounting officers of the Government settled and allowed in favor of Eaton, as above stated, was withheld from him because of a claim advanced by Sempronius H. Boyd to the entire salary as minister resident and consul-general during a part of the time for which a portion of or the whole of the salary had been allowed Eaton. Indeed, on the 16th of June, 1894, Sempronius H. Boyd sued in the court below to recover his full salary as minister resident and consul-

general from July, 1892, to February 11, 1893. Thereupon in December, 1894, Eaton commenced his action to recover the sums embraced in the following items:

A. For notarial or unofficial fees charged to him in the settlement of his salary account by report No. 162,708, as aforesaid, as per Exhibit C herewith	$177 41
B. For the item of salary suspended in the settlement of his accounts for salary by report No. 162,708, as aforesaid	726 90
C. For the balance of salary found due to claimant by report No. 162,708, as aforesaid, and certified to his credit	2546 94
D. For item expended for contingent expenses by claimant, and suspended in the settlement of his account therefor by report No. 162,709, as aforesaid	5 73
	$3456 98

The court below consolidated the two cases, and on its finding the facts above recited, rejected the claim of Sempronius H. Boyd, his widow having been substituted as a party plaintiff on his death, and allowed the full amount of the claim sued for by Eaton. From this judgment the United States alone appeals.

Mr. Assistant Attorney General Pradt and *Mr. Charles W. Russell* for appellants.

Mr. John C. Chaney and *Mr. John R. Garrison* for appellee.

Mr. Justice White, after making the foregoing statement of the case, delivered the opinion of the court.

The errors relied upon to obtain a reversal rest on three contentions: 1st. That the appointment of Eaton as acting

vice-consul was without warrant of law, and hence not susceptible of ratification by the State Department. 2d. Even if the appointment was authorized by law, the statute conferring the power was in violation of the Constitution of the United States. 3d. Because, even conceding the appointment to have been valid, the court allowed a sum in excess of the amount which the claimant was legally entitled to recover. We will dispose of these contentions in the order stated.

In the third paragraph of section 1674, Revised Statutes, the following definition is found: "Vice-consuls and vice-commercial agents shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls-general, consuls or commercial agents, when they shall be temporarily absent or relieved from duty." And this definition by Congress of the nature of a vice-consulship was not changed by the amendment to section 4130 of the Revised Statutes by the act of February 1, 1876, c. 6, 19 Stat. 2, as the obvious purpose of that act was simply to provide that where the words "minister," "consul" or "consul-general" were generally used, they should be taken also as embracing the subordinate officers who were to represent the principals in case of absence. In other words, that where a delegation of authority was made to the incumbent of the office, the fact that the name of the principal alone was mentioned should not be considered as excluding the power to exercise such authority by the subordinate and temporary officer, when the lawful occasion for the performance of the duty by him arose. Provision for the appointment and the pay of vice-consuls are found in the following sections of the Revised Statutes:

"Sec. 1695. The President is authorized to define the extent of country to be embraced within any consulate or commercial agency, and to provide for the appointment of vice-consuls, vice-commercial agents, deputy consuls and consular agents, therein, in such manner and under such regulations as he shall deem proper; but no compensation shall be allowed for the services of any such vice-consul, or vice-commercial agent, beyond nor except out of the allowance made by law for the principal consular officer in whose place such appointment

shall be made. No vice-consul, vice-commercial agent, deputy consul or consular agent, shall be appointed otherwise than under such regulations as have been or may be prescribed by the President."

"SEC. 1703. Every vice-consul and vice-commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed, as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer; . . ."

The Consular Regulations, promulgated with the approval of the President, contain the rules adopted in execution of the powers expressed in the above provisions. When the appointment in controversy took place, the regulations of 1888 were in force, and in sections 36, 87 and 471 thereof were found the rules governing the appointments of vice-consuls and temporary vice-consuls and the manner of their payment. These sections are as follows:

"36. Vice-consuls-general, deputy consuls-general, vice-consuls, deputy consuls, vice-commercial agents, deputy commercial agents and consular agents are appointed by the Secretary of State, usually upon the nomination of the principal consular officer, approved by the consul-general (if the nomination relates to a consulate or commercial agency), or if there be no consul-general, then by the diplomatic representative. If there be no consul-general or diplomatic representative, the nomination should be transmitted directly to the Department of State, as should also the nomination for subordinate officers in Mexico, British India, Manitoba and British Columbia. The nomination for vice-consul-general and deputy consul-general must be submitted to the diplomatic representative for approval, if there be one resident in the country. The privilege of making the nomination for the foregoing subordinate officers must not be construed to limit the authority of the Secretary of State, as provided by law, to appoint these officers without such previous nomination by the principal officer. The statutory power in this respect is reserved, and it will be exercised in all cases in which the

interests of the service or other public reasons may be deemed to require it."

"87. In case a vacancy occurs in the offices both of consul and vice-consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government and in conformity to law and these regulations, immediate notice being given to the Department of State. In those countries, however, where there are consuls-general, to whom the nominations of subordinate officers are required to be submitted for approval, the authority to make such temporary appointments is lodged with them. Immediate notice should be given to the diplomatic representative of the proposed appointment, and, if it can be done within a reasonable time, he should be consulted before the appointment is made. If such a vacancy should occur in a consulate general, the temporary appointment will be made by the diplomatic representative."

"471. The compensation of a vice-consul-general, vice-consul, or a vice-commercial agent is provided for only from that of the principal officer. The rules in respect to his compensation are as follows, viz.:

"1. In case the principal officer is absent on leave for sixty days or less, in any one calendar year, and does not visit the United States, the vice-consular officer acting in his place is entitled to one half of the compensation of the office from the date of assuming its duties, unless there is an agreement for a different rate, the principal officer receiving the remainder. But after the expiration of the sixty days, or after the expiration of the principal's leave of absence (if less than sixty days), the vice-consular officer is entitled to the full compensation of the office.

"2. If the principal visits the United States on such leave and returns to his post, the foregoing rule will include the time of transit both from and to his post, as explained in paragraph 460. But if the principal does not return to his post, either because of resignation or otherwise, the rule will embrace only the time of absence, not exceeding sixty days,

together with the time of transit from his post to his residence in the United States."

It is plain that the above sections of the Revised Statutes confer upon the President full power, in his discretion, to appoint vice-consuls and fix their compensation; that they forbid any appointment, except in accordance with the regulations adopted by the President, with a limitation, however, that the compensation of these officers, if appointed, should be solely "out of the allowance made by law for the principal consular officer in whose place such appointment shall be made." The regulations just quoted come clearly within the power thus delegated. The legality of the appointment in question is then first to be determined by ascertaining whether it was authorized by the regulations. Before analyzing the text of the regulations their general purpose must be borne in mind. The first section referred to, (36,) lodges the power in the Secretary of State in all cases to appoint a vice-consul or vice-consul-general. The manifest object of the provision was to prevent the continued performance of consular duties from being interrupted by any temporary cause, such as absence, sickness or even during an interregnum caused by death and before an incumbent could be appointed. This was secured by the designation in advance of a subordinate and temporary official who, in the event of the happening of the foregoing conditions, would be present to discharge the duties. Section 87 provided for a condition of affairs not embraced in section 36, that is, for the case where there would arise a temporary inability to perform duty on the part of both the consul and vice-consul. The two provisions together secure an unbroken performance of consular duties by creating the necessary machinery to have within reach one qualified to perform them, free from any vicissitude which might befall either the regular incumbent of the office of consul or the vice appointee.

In view of the recognition of Eaton by the State Department and the express approval of his bond as vice-consul, it would result that, at least from the date of the official action of the Secretary of State, he would be entitled to be treated

as appointed by that officer under section 36. But as the sum of the salary allowed by the court below antedated the approval of the bond, we pretermit this question, and come to consider whether Eaton's designation was within the regulation for emergency appointments provided in section 87.

The first requisite for calling the emergency power into play exacted by this regulation was, that there should be a vacancy in the office both of consul-general and vice-consul. It is clear that the findings establish that there was such vacancy within the meaning of the regulation. The fact that the minister resident and consul-general had obtained a leave of absence from the President, and was sick and unable to discharge his duties, and that the vice-consul previously appointed had not qualified, and was absent from Siam, did not, it is argued, justify an emergency appointment, because these facts did not create a vacancy in the narrower sense of that word. But the vacancy to which regulation 87 relates cannot be construed in a technical sense without doing violence to both the letter and spirit of the statute which authorized the regulation, and without destroying the true relation and harmonious operation of the two rules on the subject expressed in sections 36 and 87. That the statute did not contemplate a merely technical vacancy in the office of a consul-general, before a vice-consul could be appointed, clearly results from the fact that it defines the latter and subordinate officer as one "who shall be substituted temporarily to fill the places of consuls-general . . . when they shall be temporarily absent or relieved from duty." The power to make the appointment when the consul-general was only temporarily absent of necessity conveyed authority to do so, although there might be no vacancy in the office but simply an absence of the principal officer. The provision of the statute limiting the pay of the vice-consul or temporary officer out of the pay of the principal official, the incumbent, is also susceptible of but one construction, that is, that the temporary officer could be called upon to discharge the duties, even although there was an incumbent where from absence or other adequate cause he ceased temporarily to perform his duties. Regulation 36, adopted in

pursuance of the statute and providing for the appointment of vice-consuls simultaneously or concurrently with the appointment of consuls, and regulating their pay, is as clear on this subject as is the statute. As regulation 87 but adds another safeguard to that created by the general terms of 36, by providing for a contingency not contemplated in 36, that is, the case of vacancy in both the consular and vice-consular offices, it follows that the word "vacancy" in 87 imports provision for a condition like unto that contemplated by the law and provided for in 36. Looking at the two regulations together, and taking in view their purpose, it is obvious that the appointment of the temporary officer for which they both provide depended not solely on a technical vacancy, but included a case where there arose a mere absence or inability of the principal and vice-officer to discharge the duties of the consular office.

Nor is it true to say that because regulation 87 confers the power to appoint an emergency vice-consul-general "on the diplomatic representative," therefore Boyd, who was both minister resident and consul-general, was without authority to make a temporary appointment to the latter office. The argument by which this proposition is supported is as follows: As Boyd filled both offices, if there was inability to discharge the duties of the one, there was also like inability as to the other, and therefore incapacity to designate in one character a temporary officer to fill the duties of the other. The error here lies in assuming that because an official is temporarily prevented from performing the duties of his office thereby he becomes without capacity to make an emergency appointment. There is no essential identity between the two conditions, and it was because of their evident distinction that the regulations caused the existence of one condition, the temporary failure to perform duty, to give risé to the other; that is, the birth of the power to make the temporary appointment. It would lead to an absurd conclusion to construe the regulation as meaning that the very circumstance which generated the power to make the appointment had the necessary effect of preventing the coming into being of the power created.

If the two offices of minister resident and consul-general be treated as distinct and separate functions, although vested in the same natural person, the authority was clearly in the minister to appoint the vice-consul-general. If, on the other hand, the two functions be considered as indivisible the like result follows, since the mere fact that the officer had obtained a leave or was sick and unable to be present in his office and discharge its duties did not deprive him of the capacity to make a temporary appointment. In its ultimate analysis, the proposition we have just considered substantially maintains that in no case where the duties of the minister resident and consul-general are united in one person can an emergency consul-general be designated under section 87. It would follow that in every such case where leave of absence was granted or sickness arose, and there was no vice-consul-general present, the public interest must inevitably suffer in consequence of the closing of the consular office. But the very purpose of the statute and regulations was to guard against such a contingency. The evil consequences to result from admitting the proposition is conceded, but the result is attributed not to error in the argument, but to a presumed omission in the regulations, which should, it is urged, be corrected, not by judicial construction, but by an amendment or change in the regulations. The error in the proposition, however, cannot be obscured by assigning the consequences which flow from it to a defect in the regulations, when, if a sound rule of interpretation be applied, the supposed omission does not arise.

The construction rendered necessary by a consideration of the text of the statute and the regulations, by the remedy intended to be afforded, and the evil which it was their purpose to frustrate, is that the power to designate in case of the absence or the temporary inability of the consul-general was lodged in a superior officer, if there was such officer in the country where the consul discharged his duty, and, if not, on the happening of the conditions contemplated by the rule the officer highest in rank was authorized to make the temporary appointment. Doubtless it was this construction which caused the Department of State to recognize Eaton's appointment

and the Secretary of State to approve his bond as vice-consul-general. The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness.

The claim that Congress was without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the Constitution. Although article II, section 2, of the Constitution requires consuls to be appointed by the President "by and with the advice and consent of the Senate," the word "consul" therein does not embrace a subordinate and temporary officer like that of vice-consul as defined in the statute. The appointment of such an officer is within the grant of power expressed in the same section, saying "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the heads of departments." Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered. The manifest purpose of Congress in classifying and defining the grades of consular offices, in the statute to which we have referred, was to so limit the period of duty to be performed by the vice-consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of that word. A review of the legislation on the subject makes this quite clear. Section 1674, Revised Statutes, took its source in "An Act to regulate the Diplomatic and Consular Systems of the United States," approved August 18, 1856, c. 127, 11 Stat. 52. Whilst in the earlier periods of the Government, officers known as vice-

consuls were appointed by the President and confirmed by the Senate, the officials thus designated were not subordinate and temporary, but were permanent and in reality principal officials. 7 Opinions Attorneys Gen. 247; 3 Jefferson's Writings, 188. During the period, however, whilst the office of vice-consul was considered as an independent and separate function, requiring confirmation by the Senate, where a vacancy in a consular office arose by death of the incumbent, and the duties were discharged by a person who acted temporarily, without any appointment whatever, it would seem that the practice prevailed of paying such officials as *de facto* officers. In 1832 the Department of State submitted to Mr. Attorney General Taney the question of whether the son of a deceased consul, who had remained in the consular office and discharged its duties, was entitled to the pay of the office. In replying, the Attorney General said:

"If, after the death of Mr. Coxe, his son performed the services, and incurred the expenses of a residence there, and his acts have been recognized by the Government, I do not perceive why he should not receive the compensation fixed by law for such services. He was *de facto* consul for the time and the public received the benefit. . . . The practice of the Government sanctions this opinion, as appears by the papers before me; and in several instances similar to this since the law of 1810, the salary has been paid. . . . The public interest requires that the duties of the office should be discharged by some one; and where, upon the death of the consul, a person who is in possession of the papers of the consulate, enters on the discharge of its duties, and fulfils them to the satisfaction of the Government, I do not perceive why he should not be recognized as consul for the time he acted as such, and performed the services to the public, and if he is so recognized, the law of Congress entitles him to his salary." 2 Opinions Attorneys Gen. 523, 524.

The terms of the law and its construction, in practice for more than forty years, sustain the theory that a vice-consul is a mere subordinate official and we do not doubt its correctness.

We come, then, to consider the errors assigned as to the

amount of the salary. Prior to February 26, 1883, the consular official at Bangkok was of the third class, and his salary was $3000. At the date mentioned, an appropriation was made for minister resident and consul-general to Siam, $5000. 22 Stat. 424, c. 56. It was on this salary, which was reiterated in subsequent appropriations, that the allowance to Eaton was computed by the accounting officer of the Treasury, and adjudged by the court below. It is first claimed that as the vice appointment related only to the consul-general's office and not to that of minister resident, there was error in computing the allowance on the basis of the salary of both offices. Although both the statute and the regulations provide for the payment of the vice official from that of the principal officer, and of this fact Congress presumably had knowledge, yet in no case for the appropriation for the salary of the minister resident and consul-general to Siam has there been an attribution of a portion thereof to one function and another part to the other. On the contrary, Congress has treated the compensation of the two as an indivisible unit. As the duties of the two offices have thus been inseparably blended by Congress, and presumably the performance of the function of one office embraced of necessity the discharge of the duties of the other, we do not think the accounting officers erred in treating the salary fixed for the joint service as indivisible, and in not attempting an apportionment, when Congress had failed to direct that such division be made, or to furnish the method of making it. Indeed, the finding that Eaton executed all the duties of both offices required of him by the State Department, during his temporary tenure, implies that he performed, at the request of the State Department, as consul-general all the functions of minister resident. Thus the facts bring the case directly within Revised Statutes, § 1738, which provides that a consular officer may exercise diplomatic functions in the country to which he is appointed, when there is no officer of the United States empowered to discharge such duties therein, and when the consular officer is "expressly authorized by the President to do so." Conclusive cogency results from these considerations when it is borne in mind that

by the treaty between Siam and the United States there was but one diplomatic and consular officer of the United States in Siam, and that by the express terms of one of the later treaties with Siam the word "consul-general" of the United States therein used is defined to include any consular officer of the United States in Siam. 23 Stat. 782, 783.

It is further argued that as the vice-consul is required by law (Rev. Stat. § 1698) before he enters on the execution of his trust to give bond, that there was error in allowing Eaton compensation for a period prior to the approval of his bond by the Secretary of State on April 3, 1893. The finding by the court below that Eaton entered on the discharge of his duties when designated, at once communicated with the Department of State, and was recognized as consul-general and allowed to perform all the duties of that office, answers this contention. It is settled that statutory provisions of the character of those referred to are directory and not mandatory. In *United States* v. *Bradley*, 10 Pet. 343, which was a suit upon a bond given by one Hall as paymaster, it was contended that as the bond required by the statute to be executed before an appointee could enter upon the duties of the office had not been furnished, Hall was not accountable as paymaster for moneys received by him from the Government. The court, however, held otherwise, saying, per Story, J. (p. 365): "The giving of the bond was a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster, he must account for them as paymaster." In *United States* v. *Linn*, 15 Pet. 290, suit was brought upon an undertaking executed by Linn as receiver of public moneys, with sureties. A contention was advanced like that made in the *Bradley case*. The undertaking in question was not executed under seal, while the statute required that the appointee should, before entering upon the duties of the office, execute a "bond." In holding the undertaking enforceable as a common law obligation, and answering the claim that it was not valid for want of a consideration, the court, per Thompson, J., said (p. 313): "The emoluments of the office were the

considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment." And, in referring approvingly to the decision in the *Bradley case*, and in reiterating the reasoning of the opinion in that case to which we have already alluded, the court said (p. 313): "According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure* as well as *de facto* when the instrument in question was given. And although the law requiring security was directory to the officers entrusted with taking such security, Linn was under a legal as well as a moral obligation to give the security required by law." At page 314 it was also observed that it was not the mere appointment of Linn as receiver that formed the consideration of the instrument sued upon, but the emoluments and benefits resulting therefrom.

It is true, as claimed by counsel for the Government, that in the opinion delivered in the subsequent case of *United States* v. *LeBaron*, 19 How. 73, expressions are found which appear inconsistent with those to which we have just called attention. But the question presented in the *LeBaron case* was as to the proper construction of the language of a bond which had been given by a Government official, subsequent to his permanent appointment as a deputy postmaster, which bond was executed at the time the appointee was performing the duties of the office under a temporary appointment made during a recess of the Senate. Suit having been brought for a breach of the condition of the bond, it was contended that the terms of the instrument stipulated only for liability for the proper performance of the duties of the office under the first appointment. It was held, however, that as the statute required the giving of bond before the appointee could enter upon the execution of the duties of the office, it could not be presumed that the bond was intended to relate back to an earlier date than the time of its acceptance, and that its terms should be given a prospective and not a retrospective operation. In the course of the reasoning on this branch of the

case general expressions were used to the effect that the appointee could not act and the bond could not take effect until its approval; and in discussing the further contention that the appointee was not in office under the second appointment at the time the bond took effect, because his commission had not been sent to him, and was not actually transmitted until after the death of the President who had made the appointment, it was observed that the acts required by the statute to be performed by the appointee before he could enter on the possession of the office under his appointment were "conditions precedent to the complete investiture of the office;" and that "when the person has performed the required conditions, his title to enter on the possession of the office is also complete." But this general language must be confined to the precise state of facts with reference to which it was used, and does not warrant the inference that it was intended to overrule the doctrine enunciated in the *Bradley* and *Linn cases*, which were not even referred to. Indeed, that this was not supposed to be the deduction proper to be drawn from the reasoning in the *LeBaron case*, is shown by the fact that in the later case of *United States* v. *Flanders*, 112 U. S. 88, the doctrine of the earlier cases was carried to its legitimate result. In the *Flanders case*, the precise question raised in the case at bar was presented and decided. A collector of internal revenue who was required before entering upon the duties of his office to give bond and who was also required to take an oath before becoming entitled to the salary or emoluments of the office, failed to give bond or take the oath until more than two months after he had been allowed to enter upon the duties of the office. In a suit upon the bond, credit was claimed for compensation for services performed during the period preceding the taking of the oath and giving of bond, and the allowance was resisted by the Government on the ground that under the statutory provisions referred to the right to compensation did not exist. The court, however, held otherwise, saying (p. 91):

"If the collector is appointed, and acts and collects the moneys, and pays them over and accounts for them, and the

Government accepts his services and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath 'before being entitled to any of the salary or other emoluments' of the office.

"But we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate, the commission as compensation, does not arise until he takes and subscribes the oath or affirmation, but that when he does so his compensation is to be computed on moneys collected by him, from the time when, under his appointment, he began to perform services as collector, which the Government accepted, provided he has paid over and accounted for such moneys."

This was evidently the view taken by the State Department, since on January 24, 1893, when the bond was returned for reëxecution in another form, Eaton was directed to insert therein the date of his original appointment. These considerations dispose of all the questions presented, except the contention that there was error in awarding to Eaton certain items of fees collected and reported to the Treasury and charged to him, included in which were commissions of $67.91 earned on the settlement of two estates, and the sum of $5.73 disbursed by Eaton for lights upon the birthday of the King of Siam. We need only examine the legality of the two items just mentioned, as the sole objection made to the validity of the others is that Eaton was not entitled to charge them, because he was not lawfully acting as consul-general.

It is contended that the fees collected for settlement of estates should not be allowed, because the services were "official," and we are referred to paragraph 508, subdivision 69, of the Consular Regulations of 1888, as supporting this claim. On the part of the appellee, however, it is urged that the point has been held otherwise in *United States* v. *Mosby*, 133 U. S. 273, where it is said a similar objection to like charges was decided to be without merit.

It was held in the *Mosby case* that the Court of Claims properly allowed to Mosby — who had been consul at Hong Kong

from February, 1879, to July, 1885 — the sum of $8.21, as "five per cent commission on the estate of Alice Evans, May, 1881." In disposing of the matter the court said (p. 287) that "this evidently was a fee in the settlement of a private estate, and was properly allowed." It does not distinctly appear whether the fee there considered was controlled by the Consular Regulations of 1874 or by those of 1881. This is obvious when it is considered that the regulations of 1881 were only promulgated in May of that year. The regulations controlling this case are those of 1888, which in the respect in question are substantially like those of 1881, whilst fees earned prior to May, 1881, were governed by the regulations of 1874, which differed on the subject from those of 1881. Indeed, this difference between the two was referred to in the *Mosby case*, where it was said (p. 280):

"Paragraph 321 of the Regulations of 1874 is as follows: '321. All acts are to be regarded as "official services" when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States.' It is to be observed that this paragraph used the word 'required,' and does not say that all acts are to be regarded as official services when the consul uses his seal and title officially, or either of them."

* * * * *

"Paragraph 489 of the Regulations of 1881 reads as follows: '489. All acts or services for which a fee is prescribed in the tariff of fees are to be regarded as official services, and the fees received therefor are to be reported and accounted for to the Treasury of the United States,' except when otherwise expressly stated therein."

In view of the fact that it is not certain when the fees in question in the *Mosby case* were earned and of the difference between the Consular Regulations of 1874 and 1881, we shall not inquire into the correctness of the decision in the *Mosby case* as applied to the precise facts there considered, but will examine the question here presented in the light of the Consular Regulations of 1888 and as one of first impression.

Opinion of the Court.

By section 1745 of the Revised Statutes, the President is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged by diplomatic and consular officers for official services, "and to designate what shall be regarded as official services, besides such as are expressly declared by law." Section 1709 of the Revised Statutes makes it the "duty" of consuls and vice-consuls to administer upon the personal estate left by any citizen of the United States who shall die within their consulate.

The fact that the statute makes it the duty of a consul to administer on personal estates gives rise to the clearest implication that fees for such services were official fees, and the regulations on the subject promulgated by the President clearly support this view. Thus, in the tariff of consular fees contained in paragraph 508 of the Consular Regulations of 1888 it is provided, in item numbered 56, as follows:

"56. For taking into possession the personal estate of any citizen who shall die within the limits of a consulate, inventorying, selling and finally settling and preparing or transmitting, according to law, the balance due thereon, five per cent on the gross amount of such estate. If part of such estate shall be delivered over before final settlement, two and one half per cent to be charged on the part so delivered over as is not in money, and five per cent on the gross amount of the residue. If among the effects of the deceased are found certificates of foreign stocks, loans or other property, two and one half per cent on the amount thereof. No charge will be made for placing the official seal upon the personal property or effects of such deceased citizen, or for breaking or removing the seals."

And, by paragraph 375 of the same regulations, a consular officer is directed to report to the Treasury Department fees of this character, and if he be a salaried officer to hold the same subject to the order of the department. This decisive provision is besides supplemented by paragraph 501 of the regulations, in which it is declared that "all acts or services for which a fee is prescribed in the tariff of fees are to be regarded as *official* services, and the fees charged and received

therefor are to be reported and accounted for to the Treasury of the United States, except when otherwise expressly stated therein."

As the statute made it the official duty of a consul to administer upon the estates of American citizens dying within the consular district, and the President, by virtue of the power vested in him, has clearly placed such duties in the category of "official services," and required the fees earned therefor to be accounted for as "official fees," it is plain that the accounting officer of the Treasury properly charged Eaton with the amount of such fees, and that the Court of Claims erred in its ruling to the contrary.

The ground of objection urged to the allowance by the Court of Claims of the item of $5.73 is stated in the brief to be that the disbursement "was personal or diplomatic and wholly foreign to consular business." We are unable, however, to say that the Court of Claims erred in its finding in respect to this item, as follows: "The petty item for lights upon the King's birthday was approved by the Department of State, and appears to be a charge within the discretion of that department; it is therefore allowed."

It follows from the foregoing considerations that the only error committed by the court below was in treating the fees for the settlement of estates as unofficial, when they should have been held to be official. But this does not render it necessary to reverse the judgment in its entirety, but only to modify the same. Rev. Stat. sec. 707; *Ballew* v. *United States*, 160 U. S. 187. This modification will be effected by deducting from the principal sum of $3456.98, found due by the Court of Claims, $67.91, being the amount of the fees improperly allowed. The judgment of the Court of Claims is therefore modified by reducing the amount thereof to $3389.07, and as so modified it is

Affirmed.